United Nations

Report of the International Law Commission

Sixty-third session
(26 April-3 June and 4 July-12 August 2011)

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Supplement No. 10

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The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook ... 1971*) indicates a reference to the *Yearbook of the International Law Commission*.

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Chapter IV
Reservations to treaties (*continued*)

F. Text of the Guide to Practice on Reservations to Treaties, adopted by the Commission at its sixty-third session

1. Text of the guidelines constituting the Guide to Practice, followed by an annex on the reservations dialogue (*A/66/10, para. 75*)

1. The text of the guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission at its sixty-third session, followed by an annex on the reservations dialogue, is reproduced below:

Guide to Practice on Reservations to Treaties

1. Definitions

1.1 Definition of reservations

1. "Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

2. Paragraph 1 is to be interpreted as including reservations which purport to exclude or to modify the legal effect of certain provisions of a treaty, or of the treaty as a whole with respect to certain specific aspects, in their application to the State or to the international organization which formulates the reservation.

1.1.1 Statements purporting to limit the obligations of their author

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty, by which its author purports to limit the obligations imposed on it by the treaty, constitutes a reservation.

1.1.2 Statements purporting to discharge an obligation by equivalent means

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty, by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from, but considered by the author of the statement to be equivalent to that imposed by the treaty, constitutes a reservation.

1.1.3 Reservations relating to the territorial application of the treaty

A unilateral statement by which a State purports to exclude the application of some provisions of a treaty, or of the treaty as a whole with respect to certain specific aspects, to a territory to which they would be applicable in the absence of such a statement constitutes a reservation.

1.1.4 Reservations formulated when extending the territorial application of a treaty

A unilateral statement by which a State, when extending the application of a treaty to a territory, purports to exclude or to modify the legal effect of certain provisions of the treaty in relation to that territory constitutes a reservation.

1.1.5 Reservations formulated jointly

The joint formulation of a reservation by several States or international organizations does not affect the unilateral character of that reservation.

1.1.6 Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of a treaty

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty with regard to the party that has made the statement, constitutes a reservation expressly authorized by the treaty.

1.2 Definition of interpretative declarations

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.

1.2.1 Interpretative declarations formulated jointly

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral character of that interpretative declaration.

1.3 Distinction between reservations and interpretative declarations

The character of a unilateral statement as a reservation or as an interpretative declaration is determined by the legal effect that its author purports to produce.

1.3.1 Method of determining the distinction between reservations and interpretative declarations

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, the statement should be interpreted in good faith in accordance with the ordinary meaning to be given to its terms, with a view to identifying therefrom the intention of its author, in light of the treaty to which it refers.

1.3.2 Phrasing and name

The phrasing or name of a unilateral statement provides an indication of the purported legal effect.

1.3.3 Formulation of a unilateral statement when a reservation is prohibited

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect of those provisions by a State or an international organization shall be presumed not to constitute a reservation. Such a statement nevertheless constitutes a reservation if it purports to exclude or modify the legal effect of certain provisions of the treaty, or of the treaty as a whole with respect to certain specific aspects, in their application to its author.

1.4 Conditional interpretative declarations

1. A conditional interpretative declaration is a unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof.

2. Conditional interpretative declarations are subject to the rules applicable to reservations.

1.5 Unilateral statements other than reservations and interpretative declarations

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations (including conditional interpretative declarations) are outside the scope of the present Guide to Practice.

1.5.1 Statements of non-recognition

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

1.5.2 Statements concerning modalities of implementation of a treaty at the internal level

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without affecting its rights and obligations towards the other contracting States or contracting organizations, is outside the scope of the present Guide to Practice.

1.5.3 Unilateral statements made under a clause providing for options

1. A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty permitting the parties to accept an obligation that is not otherwise imposed by the treaty, or permitting them to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

2. A restriction or condition contained in a statement by which a State or an international organization accepts, by virtue of a clause in a treaty, an obligation that is not otherwise imposed by the treaty does not constitute a reservation.

1.6 Unilateral statements in respect of bilateral treaties

1.6.1 "Reservations" to bilateral treaties

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty, does not constitute a reservation within the meaning of the present Guide to Practice.

1.6.2 Interpretative declarations in respect of bilateral treaties

Guidelines 1.2 and 1.4 are applicable to interpretative declarations in respect of both multilateral and bilateral treaties.

1.6.3 Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes an authentic interpretation of that treaty.

1.7 Alternatives to reservations and interpretative declarations

1.7.1 Alternatives to reservations

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

- the insertion in the treaty of a clause purporting to limit its scope or application;
- the conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effect of certain provisions of the treaty as between themselves.

1.7.2 Alternatives to interpretative declarations

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

- the insertion in the treaty of provisions purporting to interpret the treaty;
- the conclusion of a supplementary agreement to the same end, simultaneously or subsequently to the conclusion of the treaty.

1.8 Scope of definitions

The definitions of unilateral statements included in the present Part are without prejudice to the validity and legal effects of such statements under the rules applicable to them.

2. Procedure

2.1 Form and notification of reservations

2.1.1 Form of reservations

A reservation must be formulated in writing.

2.1.2 Statement of reasons for reservations

A reservation should, to the extent possible, indicate the reasons why it is being formulated.

2.1.3 Representation for the purpose of formulating a reservation at the international level

1. Subject to the usual practices followed in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

(a) that person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(b) it appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State or the international organization for such purposes without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State for the purpose of formulating a reservation at the international level:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;

(b) representatives accredited by States to an international conference, for the purpose of formulating a reservation to a treaty adopted at that conference;

(c) representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted in that organization or organ;

(d) heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

2.1.4 Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations

1. The competent authority and the procedure to be followed at the internal level for formulating a reservation are determined by the internal law of each State or the relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations for the purpose of invalidating the reservation.

2.1.5 Communication of reservations

1. A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

2. A reservation to a treaty in force which is the constituent instrument of an international organization must also be communicated to such organization.

2.1.6 Procedure for communication of reservations

1. Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, the communication of a reservation to a treaty shall be transmitted:

(i) if there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) if there is a depositary, to the latter, which shall notify the States and international organizations for which it is intended as soon as possible.

2. The communication of a reservation shall be considered as having been made with regard to a State or an international organization only upon receipt by that State or organization.

3. The communication of a reservation to a treaty by means other than a diplomatic note or depositary notification, such as electronic mail or facsimile, must be confirmed within an appropriate period of time by such a note or notification. In such case, the reservation is considered as having been formulated at the date of the initial communication.

2.1.7 Functions of depositaries

1. The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, if need be, bring the matter to the attention of the State or international organization concerned.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) the signatory States and organizations and the contracting States and contracting organizations; or

(b) where appropriate, the competent organ of the international organization concerned.

2.2 Confirmation of reservations

2.2.1 Formal confirmation of reservations formulated when signing a treaty

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been formulated on the date of its confirmation.

2.2.2 Instances of non-requirement of confirmation of reservations formulated when signing a treaty

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by signature its consent to be bound by the treaty.

2.2.3 Reservations formulated upon signature when a treaty expressly so provides

Where the treaty expressly provides that a State or an international organization may formulate a reservation when signing the treaty, such a reservation does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

2.2.4 Form of formal confirmation of reservations

The formal confirmation of a reservation must be made in writing.

2.3 Late formulation of reservations

A State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty, unless the treaty otherwise provides or none of the other contracting States and contracting organizations opposes the late formulation of the reservation.

2.3.1 Acceptance of the late formulation of a reservation

Unless the treaty otherwise provides or the well-established practice followed by the depositary differs, the late formulation of a reservation shall only be deemed to have been accepted if no contracting State or contracting organization has opposed such formulation after the expiry of the twelve-month period following the date on which notification was received.

2.3.2 Time period for formulating an objection to a reservation that is formulated late

An objection to a reservation that is formulated late must be made within twelve months of the acceptance, in accordance with guideline 2.3.1, of the late formulation of the reservation.

2.3.3 Limits to the possibility of excluding or modifying the legal effect of a treaty by means other than reservations

A contracting State or a contracting organization cannot exclude or modify the legal effect of provisions of the treaty by:

(a) the interpretation of an earlier reservation; or

(b) a unilateral statement made subsequently under a clause providing for options.

2.3.4 Widening of the scope of a reservation

The modification of an existing reservation for the purpose of widening its scope is subject to the rules applicable to the late formulation of a reservation. If such a modification is opposed, the initial reservation remains unchanged.

2.4 Procedure for interpretative declarations

2.4.1 Form of interpretative declarations

An interpretative declaration should preferably be formulated in writing.

2.4.2 Representation for the purpose of formulating interpretative declarations

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

2.4.3 Absence of consequences at the international level of the violation of internal rules regarding the formulation of interpretative declarations

1. The competent authority and the procedure to be followed at the internal level for formulating an interpretative declaration are determined by the internal law of each State or the relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations for the purpose of invalidating the declaration.

2.4.4 Time at which an interpretative declaration may be formulated

Without prejudice to the provisions of guidelines 1.4 and 2.4.7, an interpretative declaration may be formulated at any time.

2.4.5 Communication of interpretative declarations

The communication of written interpretative declarations should follow the procedure established in guidelines 2.1.5, 2.1.6 and 2.1.7.

2.4.6 Non-requirement of confirmation of interpretative declarations formulated when signing a treaty

An interpretative declaration formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

2.4.7 Late formulation of an interpretative declaration

Where a treaty provides that an interpretative declaration may be formulated only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently, unless none of the other contracting States and contracting organizations objects to the late formulation of the interpretative declaration.

2.4.8 Modification of an interpretative declaration

Unless the treaty otherwise provides, an interpretative declaration may be modified at any time.

2.5 Withdrawal and modification of reservations and interpretative declarations

2.5.1 Withdrawal of reservations

Unless the treaty otherwise provides, a reservation may be withdrawn at any time without the consent of a State or of an international organization which has accepted the reservation being required for its withdrawal.

2.5.2 Form of withdrawal

The withdrawal of a reservation must be formulated in writing.

2.5.3 Periodic review of the usefulness of reservations

1. States or international organizations which have formulated one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

2. In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, consider the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

2.5.4 Representation for the purpose of withdrawing a reservation at the international level

1. Subject to the usual practices followed in international organizations which are depositaries of treaties, a person is considered as representing a State or an international

organization for the purpose of withdrawing a reservation made on behalf of a State or an international organization if:

(a) that person produces appropriate full powers for the purpose of that withdrawal; or

(b) it appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State or the international organization for such purpose without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of withdrawing a reservation at the international level on behalf of that State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;

(b) representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted in that organization or organ;

(c) heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization.

2.5.5 Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations

1. The competent authority and the procedure to be followed at the internal level for withdrawing a reservation are determined by the internal law of each State or the relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations for the purpose of invalidating the withdrawal.

2.5.6 Communication of withdrawal of a reservation

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 and 2.1.7.

2.5.7 Effects of withdrawal of a reservation

1. The withdrawal of a reservation entails the full application of the provisions to which the reservation relates in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

2. The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation.

2.5.8 Effective date of withdrawal of a reservation

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

2.5.9 Cases in which the author of a reservation may set the effective date of withdrawal of the reservation

The withdrawal of a reservation becomes operative on the date set by the State or international organization which withdraws the reservation, where:

(a) that date is later than the date on which the other contracting States or contracting organizations received notification of it; or

(b) the withdrawal does not add to the rights of the withdrawing State or international organization, in relation to the other contracting States or contracting organizations.

2.5.10 Partial withdrawal of reservations

1. The partial withdrawal of a reservation limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, in the relations between the withdrawing State or international organization and the other parties to the treaty.

2. The partial withdrawal of a reservation is subject to the same rules on form and procedure as a total withdrawal and becomes operative on the same conditions.

2.5.11 Effect of a partial withdrawal of a reservation

1. The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent provided by the new formulation of the reservation. Any objection formulated to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.

2. No new objection may be formulated to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect.

2.5.12 Withdrawal of interpretative declarations

An interpretative declaration may be withdrawn at any time by an authority considered as representing the State or international organization for that purpose, following the same procedure applicable to its formulation.

2.6 Formulation of objections

2.6.1 Definition of objections to reservations

"Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation formulated by another State or international organization, whereby the former State or organization purports to preclude the reservation from having its intended effects or otherwise opposes the reservation.

2.6.2 Right to formulate objections

A State or an international organization may formulate an objection to a reservation irrespective of the permissibility of the reservation.

2.6.3 Author of an objection

An objection to a reservation may be formulated by:

(i) any contracting State or contracting organization; and

(ii) any State or international organization that is entitled to become a party to the treaty, in which case the objection does not produce any legal effect until the State or international organization has expressed its consent to be bound by the treaty.

2.6.4 Objections formulated jointly

The joint formulation of an objection by several States or international organizations does not affect the unilateral character of that objection.

2.6.5 Form of objections

An objection must be formulated in writing.

2.6.6 Right to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation

A State or an international organization that formulates an objection to a reservation may oppose the entry into force of the treaty as between itself and the author of the reservation.

2.6.7 Expression of intention to preclude the entry into force of the treaty

When a State or an international organization formulating an objection to a reservation intends to preclude the entry into force of the treaty as between itself and the reserving State or international organization, it shall definitely express its intention before the treaty would otherwise enter into force between them.

2.6.8 Procedure for the formulation of objections

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to objections.

2.6.9 Statement of reasons for objections

An objection should, to the extent possible, indicate the reasons why it is being formulated.

2.6.10 Non-requirement of confirmation of an objection formulated prior to formal confirmation of a reservation

An objection to a reservation formulated by a State or an international organization prior to confirmation of the reservation in accordance with guideline 2.2.1 does not itself require confirmation.

2.6.11 Confirmation of an objection formulated prior to the expression of consent to be bound by a treaty

An objection formulated prior to the expression of consent to be bound by the treaty does not need to be formally confirmed by the objecting State or international organization at the time it expresses its consent to be bound if that State or that organization was a signatory to the treaty when it formulated the objection; it must be confirmed if the State or international organization had not signed the treaty.

2.6.12 Time period for formulating objections

Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation within a period of twelve months after it was notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later.

2.6.13 Objections formulated late

An objection to a reservation formulated after the end of the time period specified in guideline 2.6.12 does not produce all the legal effects of an objection formulated within that time period.

2.7 Withdrawal and modification of objections to reservations

2.7.1 Withdrawal of objections to reservations

Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

2.7.2 Form of withdrawal of objections to reservations

The withdrawal of an objection to a reservation must be formulated in writing.

2.7.3 Formulation and communication of the withdrawal of objections to reservations

Guidelines 2.5.4, 2.5.5 and 2.5.6 are applicable *mutatis mutandis* to the withdrawal of objections to reservations.

2.7.4 Effect on reservation of withdrawal of an objection

A State or an international organization that withdraws an objection formulated to a reservation is presumed to have accepted that reservation.

2.7.5 Effective date of withdrawal of an objection

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

2.7.6 Cases in which the author of an objection may set the effective date of withdrawal of the objection

The withdrawal of an objection becomes operative on the date set by its author where that date is later than the date on which the reserving State or international organization received notice of it.

2.7.7 Partial withdrawal of an objection

1. Unless the treaty otherwise provides, a State or an international organization may partially withdraw an objection to a reservation.

2. The partial withdrawal of an objection is subject to the same rules on form and procedure as a total withdrawal and becomes operative on the same conditions.

2.7.8 Effect of a partial withdrawal of an objection

The partial withdrawal modifies the legal effects of the objection on the treaty relations between the author of the objection and the author of the reservation to the extent provided by the new formulation of the objection.

2.7.9 Widening of the scope of an objection to a reservation

1. A State or an international organization which has made an objection to a reservation may widen the scope of that objection during the time period referred to in guideline 2.6.12.

2. Such a widening of the scope of the objection cannot have an effect on the existence of treaty relations between the author of the reservation and the author of the objection.

2.8 Formulation of acceptances of reservations

2.8.1 Forms of acceptance of reservations

The acceptance of a reservation may arise from a unilateral statement to this effect or from silence of a contracting State or contracting organization during the periods specified in guideline 2.6.12.

2.8.2 Tacit acceptance of reservations

Unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation within the time period provided for in guideline 2.6.12.

2.8.3 Express acceptance of reservations

A State or an international organization may, at any time, expressly accept a reservation formulated by another State or international organization.

2.8.4 Form of express acceptance of reservations

The express acceptance of a reservation must be formulated in writing.

2.8.5 Procedure for formulating express acceptance of reservations

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 apply *mutatis mutandis* to express acceptances.

2.8.6 Non-requirement of confirmation of an acceptance formulated prior to formal confirmation of a reservation

An express acceptance of a reservation formulated by a State or an international organization prior to confirmation of the reservation in accordance with guideline 2.2.1 does not itself require confirmation.

2.8.7 Unanimous acceptance of reservations

In the event of a reservation requiring unanimous acceptance by some or all States or international organizations which are parties or entitled to become parties to the treaty, such acceptance, once obtained, is final.

2.8.8 Acceptance of a reservation to the constituent instrument of an international organization

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

2.8.9 Organ competent to accept a reservation to a constituent instrument

Subject to the rules of the organization, competence to accept a reservation to a constituent instrument of an international organization belongs to the organ competent to:

- decide on the admission of a member to the organization; or
- amend the constituent instrument: or
- interpret this instrument.

2.8.10 Modalities of the acceptance of a reservation to a constituent instrument

1. Subject to the rules of the organization, the acceptance by the competent organ of the organization shall not be tacit. However, the admission of the State or the international organization which is the author of the reservation is tantamount to the acceptance of that reservation.

2. For the purposes of the acceptance of a reservation to the constituent instrument of an international organization, the individual acceptance of the reservation by States or international organizations that are members of the organization is not required.

2.8.11 Acceptance of a reservation to a constituent instrument that has not yet entered into force

In the case set forth in guideline 2.8.8 and where the constituent instrument has not yet entered into force, a reservation is considered to have been accepted if no signatory State or signatory international organization has raised an objection to that reservation within a period of twelve months after they were notified of that reservation. Such a unanimous acceptance, once obtained, is final.

2.8.12 Reaction by a member of an international organization to a reservation to its constituent instrument

Guideline 2.8.10 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.

2.8.13 Final nature of acceptance of a reservation

The acceptance of a reservation cannot be withdrawn or amended.

2.9 Formulation of reactions to interpretative declarations

2.9.1 Approval of an interpretative declaration

"Approval" of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization expresses agreement with the interpretation formulated in that declaration.

2.9.2 Opposition to an interpretative declaration

"Opposition" to an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization disagrees with the interpretation formulated in the interpretative declaration, including by formulating an alternative interpretation.

2.9.3 Recharacterization of an interpretative declaration

1. "Recharacterization" of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization purports to treat the declaration as a reservation.

2. A State or an international organization that intends to treat an interpretative declaration as a reservation should take into account guidelines 1.3 to 1.3.3.

2.9.4 Right to formulate approval or opposition, or to recharacterize

An approval, opposition or recharacterization in respect of an interpretative declaration may be formulated at any time by any contracting State or any contracting organization and by any State or any international organization that is entitled to become a party to the treaty.

2.9.5 Form of approval, opposition and recharacterization

An approval, opposition or recharacterization in respect of an interpretative declaration should preferably be formulated in writing.

2.9.6 Statement of reasons for approval, opposition and recharacterization

An approval, opposition or recharacterization in respect of an interpretative declaration should, to the extent possible, indicate the reasons why it is being formulated.

2.9.7 Formulation and communication of approval, opposition or recharacterization

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to an approval, opposition or recharacterization in respect of an interpretative declaration.

2.9.8 Non-presumption of approval or opposition

1. An approval of, or an opposition to, an interpretative declaration shall not be presumed.

2. Notwithstanding guidelines 2.9.1 and 2.9.2, an approval of an interpretative declaration or an opposition thereto may be inferred, in exceptional cases, from the conduct of the States or international organizations concerned, taking into account all relevant circumstances.

2.9.9 Silence with respect to an interpretative declaration

An approval of an interpretative declaration shall not be inferred from the mere silence of a State or an international organization.

3. Permissibility of reservations and interpretative declarations

3.1 Permissible reservations

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

3.1.1 Reservations prohibited by the treaty

A reservation is prohibited by the treaty if it contains a provision:

(a) prohibiting all reservations;

(b) prohibiting reservations to specified provisions to which the reservation in question relates; or

(c) prohibiting certain categories of reservations including the reservation in question.

3.1.2 Definition of specified reservations

For the purposes of guideline 3.1, the expression "specified reservations" means reservations that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects.

3.1.3 Permissibility of reservations not prohibited by the treaty

Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

3.1.4 Permissibility of specified reservations

Where the treaty envisages the formulation of specified reservations without defining their content, a reservation may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

3.1.5 Incompatibility of a reservation with the object and purpose of the treaty

A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the *raison d'être* of the treaty.

3.1.5.1 Determination of the object and purpose of the treaty

The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context, in particular the title and the preamble of the treaty. Recourse may also be had to the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties.

3.1.5.2 Vague or general reservations

A reservation shall be worded in such a way as to allow its meaning to be understood, in order to assess in particular its compatibility with the object and purpose of the treaty.

3.1.5.3 Reservations to a provision reflecting a customary rule

The fact that a treaty provision reflects a rule of customary international law does not in itself constitute an obstacle to the formulation of a reservation to that provision.

3.1.5.4 Reservations to provisions concerning rights from which no derogation is permissible under any circumstances

A State or an international organization may not formulate a reservation to a treaty provision concerning rights from which no derogation is permissible under any circumstances, unless the reservation in question is compatible with the essential rights and obligations arising out of that treaty. In assessing that compatibility, account shall be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.

3.1.5.5 Reservations relating to internal law

A reservation by which a State or an international organization purports to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in order to preserve the integrity of specific rules of the internal law of that State or of specific rules of that organization in force at the time of the formulation of the reservation may be formulated only insofar as it does not affect an essential element of the treaty nor its general tenour.

3.1.5.6 Reservations to treaties containing numerous interdependent rights and obligations

To assess the compatibility of a reservation with the object and purpose of a treaty containing numerous interdependent rights and obligations, account shall be taken of that interdependence as well as the importance that the provision to which the reservation relates has within the general tenour of the treaty, and the extent of the impact that the reservation has on the treaty.

3.1.5.7 Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty

A reservation to a treaty provision concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, unless:

(i) the reservation purports to exclude or modify the legal effect of a provision of the treaty essential to its *raison d'être*; or

(ii) the reservation has the effect of excluding the reserving State or international organization from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that it has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect.

3.2 Assessment of the permissibility of reservations

The following may assess, within their respective competences, the permissibility of reservations to a treaty formulated by a State or an international organization:

- contracting States or contracting organizations;
- dispute settlement bodies;
- treaty monitoring bodies.

3.2.1 Competence of the treaty monitoring bodies to assess the permissibility of reservations

1. A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization.

2. The assessment made by such a body in the exercise of this competence has no greater legal effect than that of the act which contains it.

3.2.2 Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations

When providing bodies with the competence to monitor the application of treaties, States or international organizations should specify, where appropriate, the nature and the limits of the competence of such bodies to assess the permissibility of reservations.

3.2.3 Consideration of the assessments of treaty monitoring bodies

States and international organizations that have formulated reservations to a treaty establishing a treaty monitoring body shall give consideration to that body's assessment of the permissibility of the reservations.

3.2.4 Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body

When a treaty establishes a treaty monitoring body, the competence of that body is without prejudice to the competence of the contracting States or contracting organizations to assess the permissibility of reservations to that treaty, or to that of dispute settlement bodies competent to interpret or apply the treaty.

3.2.5 Competence of dispute settlement bodies to assess the permissibility of reservations

When a dispute settlement body is competent to adopt decisions binding upon the parties to a dispute, and the assessment of the permissibility of a reservation is necessary for the discharge of such competence by that body, such assessment is, as an element of the decision, legally binding upon the parties.

3.3 Consequences of the non-permissibility of a reservation

3.3.1 Irrelevance of distinction among the grounds for non-permissibility

A reservation formulated notwithstanding a prohibition arising from the provisions of the treaty or notwithstanding its incompatibility with the object and purpose of the treaty is impermissible, without there being any need to distinguish between the consequences of these grounds for non-permissibility.

3.3.2 Non-permissibility of reservations and international responsibility

The formulation of an impermissible reservation produces its consequences pursuant to the law of treaties and does not engage the international responsibility of the State or international organization which has formulated it.

3.3.3 Absence of effect of individual acceptance of a reservation on the permissibility of the reservation

Acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not affect the impermissibility of the reservation.

3.4 Permissibility of reactions to reservations

3.4.1 Permissibility of the acceptance of a reservation

Acceptance of a reservation is not subject to any condition of permissibility.

3.4.2 Permissibility of an objection to a reservation

An objection to a reservation by which a State or an international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty to which the reservation does not relate is only permissible if:

(1) the provisions thus excluded have a sufficient link with the provisions to which the reservation relates; and

(2) the objection would not defeat the object and purpose of the treaty in the relations between the author of the reservation and the author of the objection.

3.5 Permissibility of an interpretative declaration

A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is prohibited by the treaty.

3.5.1 Permissibility of an interpretative declaration which is in fact a reservation

If a unilateral statement which appears to be an interpretative declaration is in fact a reservation, its permissibility must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.5.7.

3.6 Permissibility of reactions to interpretative declarations

An approval of, opposition to, or recharacterization of, an interpretative declaration shall not be subject to any conditions for permissibility.

4. Legal effects of reservations and interpretative declarations

4.1 Establishment of a reservation with regard to another State or international organization

A reservation formulated by a State or an international organization is established with regard to a contracting State or a contracting organization if it is permissible and was formulated in accordance with the required form and procedures, and if that contracting State or contracting organization has accepted it.

4.1.1 Establishment of a reservation expressly authorized by a treaty

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States and contracting organizations, unless the treaty so provides.

2. A reservation expressly authorized by a treaty is established with regard to the other contracting States and contracting organizations if it was formulated in accordance with the required form and procedures.

4.1.2 Establishment of a reservation to a treaty which has to be applied in its entirety

When it appears, from the limited number of negotiating States and organizations and the object and purpose of the treaty, that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation to this treaty is established with regard to the other contracting States and contracting organizations if it is permissible and was formulated in accordance with the required form and procedures, and if all the contracting States and contracting organizations have accepted it.

4.1.3 Establishment of a reservation to a constituent instrument of an international organization

When a treaty is a constituent instrument of an international organization, a reservation to this treaty is established with regard to the other contracting States and contracting organizations if it is permissible and was formulated in accordance with the required form and procedures, and if it has been accepted in conformity with guidelines 2.8.8 to 2.8.11.

4.2 Effects of an established reservation

4.2.1 Status of the author of an established reservation

As soon as a reservation is established in accordance with guidelines 4.1 to 4.1.3, its author becomes a contracting State or contracting organization to the treaty.

4.2.2 Effect of the establishment of a reservation on the entry into force of a treaty

1. When a treaty has not yet entered into force, the author of a reservation shall be included in the number of contracting States and contracting organizations required for the treaty to enter into force once the reservation is established.

2. The author of the reservation may however be included at a date prior to the establishment of the reservation in the number of contracting States and contracting organizations required for the treaty to enter into force, if no contracting State or contracting organization is opposed.

4.2.3 Effect of the establishment of a reservation on the status of the author as a party to the treaty

The establishment of a reservation constitutes its author a party to the treaty in relation to contracting States and contracting organizations in respect of which the reservation is established if or when the treaty is in force.

4.2.4 Effect of an established reservation on treaty relations

1. A reservation established with regard to another party excludes or modifies for the reserving State or international organization in its relations with that other party the legal effect of the provisions of the treaty to which the reservation relates or of the treaty as a whole with respect to certain specific aspects, to the extent of the reservation.

2. To the extent that an established reservation excludes the legal effect of certain provisions of a treaty, the author of that reservation has neither rights nor obligations under those provisions in its relations with the other parties with regard to which the reservation is established. Those other parties shall likewise have neither rights nor obligations under those provisions in their relations with the author of the reservation.

3. To the extent that an established reservation modifies the legal effect of certain provisions of a treaty, the author of that reservation has rights and obligations under those provisions, as modified by the reservation, in its relations with the other parties with regard to which the reservation is established. Those other parties shall have rights and obligations under those provisions, as modified by the reservation, in their relations with the author of the reservation.

4.2.5 Non-reciprocal application of obligations to which a reservation relates

Insofar as the obligations under the provisions to which the reservation relates are not subject to reciprocal application in view of the nature of the obligations or the object and purpose of the treaty, the content of the obligations of the parties other than the author of the reservation remains unaffected. The content of the obligations of those parties likewise remains unaffected when reciprocal application is not possible because of the content of the reservation.

4.2.6 Interpretation of reservations

A reservation is to be interpreted in good faith, taking into account the intention of its author as reflected primarily in the text of the reservation, as well as the object and purpose of the treaty and the circumstances in which the reservation was formulated.

4.3 Effect of an objection to a valid reservation

Unless the reservation has been established with regard to an objecting State or organization, the formulation of an objection to a valid reservation precludes the reservation from having its intended effects as against that State or international organization.

4.3.1 Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation

An objection by a contracting State or by a contracting organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, except in the case mentioned in guideline 4.3.5.

4.3.2 Effect of an objection to a reservation that is formulated late

If a contracting State or a contracting organization to a treaty objects to a reservation whose late formulation has been unanimously accepted in accordance with guideline 2.3.1, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

4.3.3 Entry into force of the treaty between the author of a reservation and the author of an objection

The treaty enters into force between the author of a valid reservation and the objecting contracting State or contracting organization as soon as the author of the reservation has become a contracting State or a contracting organization in accordance with guideline 4.2.1 and the treaty has entered into force.

4.3.4 Non-entry into force of the treaty for the author of a reservation when unanimous acceptance is required

If the establishment of a reservation requires the acceptance of the reservation by all the contracting States and contracting organizations, any objection by a contracting State or by a contracting organization to a valid reservation precludes the entry into force of the treaty for the reserving State or organization.

4.3.5 Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect

An objection by a contracting State or a contracting organization to a valid reservation precludes the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, if the objecting State or organization has definitely expressed an intention to that effect in accordance with guideline 2.6.7.

4.3.6 Effect of an objection on treaty relations

1. When a State or an international organization objecting to a valid reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the author of the reservation and the objecting State or organization, to the extent of the reservation.

2. To the extent that a valid reservation purports to exclude the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the

author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions to which the reservation relates.

3. To the extent that a valid reservation purports to modify the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions of the treaty as intended to be modified by the reservation.

4. All the provisions of the treaty other than those to which the reservation relates shall remain applicable as between the reserving State or organization and the objecting State or organization.

4.3.7 Effect of an objection on provisions other than those to which the reservation relates

1. A provision of the treaty to which the reservation does not relate, but which has a sufficient link with the provisions to which the reservation does relate, is not applicable in the treaty relations between the author of the reservation and the author of an objection formulated in accordance with guideline 3.4.2.

2. The reserving State or international organization may, within a period of twelve months following the notification of an objection which has the effect referred to in paragraph 1, oppose the entry into force of the treaty between itself and the objecting State or organization. In the absence of such opposition, the treaty shall apply between the author of the reservation and the author of the objection to the extent provided by the reservation and the objection.

4.3.8 Right of the author of a valid reservation not to comply with the treaty without the benefit of its reservation

The author of a valid reservation is not required to comply with the provisions of the treaty without the benefit of its reservation.

4.4 Effect of a reservation on rights and obligations independent of the treaty

4.4.1 Absence of effect on rights and obligations under other treaties

A reservation, acceptance of a reservation or objection to a reservation neither modifies nor excludes any rights and obligations of their authors under other treaties to which they are parties.

4.4.2 Absence of effect on rights and obligations under customary international law

A reservation to a treaty provision which reflects a rule of customary international law does not of itself affect the rights and obligations under that rule, which shall continue to apply as such between the reserving State or organization and other States or international organizations which are bound by that rule.

4.4.3 Absence of effect on a peremptory norm of general international law (*jus cogens*)

1. A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall

continue to apply as such between the reserving State or organization and other States or international organizations.

2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.

4.5 Consequences of an invalid reservation

4.5.1 Nullity of an invalid reservation

A reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of any legal effect.

4.5.2 Reactions to a reservation considered invalid

1. The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization.

2. Nevertheless, a State or an international organization which considers that a reservation is invalid should formulate a reasoned objection as soon as possible.

4.5.3 Status of the author of an invalid reservation in relation to the treaty

1. The status of the author of an invalid reservation in relation to a treaty depends on the intention expressed by the reserving State or international organization on whether it intends to be bound by the treaty without the benefit of the reservation or whether it considers that it is not bound by the treaty.

2. Unless the author of the invalid reservation has expressed a contrary intention or such an intention is otherwise established, it is considered a contracting State or a contracting organization without the benefit of the reservation.

3. Notwithstanding paragraphs 1 and 2, the author of the invalid reservation may express at any time its intention not to be bound by the treaty without the benefit of the reservation.

4. If a treaty monitoring body expresses the view that a reservation is invalid and the reserving State or international organization intends not to be bound by the treaty without the benefit of the reservation, it should express its intention to that effect within a period of twelve months from the date at which the treaty monitoring body made its assessment.

4.6 Absence of effect of a reservation on the relations between the other parties to the treaty

A reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

4.7 Effect of interpretative declarations

4.7.1 Clarification of the terms of the treaty by an interpretative declaration

1. An interpretative declaration does not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to certain provisions

thereof and may, as appropriate, constitute an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties.

2. In interpreting the treaty, account shall also be taken, as appropriate, of the approval of, or opposition to, the interpretative declaration, by other contracting States or contracting organizations.

4.7.2 Effect of the modification or the withdrawal of an interpretative declaration

The modification or the withdrawal of an interpretative declaration may not produce the effects provided for in draft guideline 4.7.1 to the extent that other contracting States or contracting organizations have relied upon the initial declaration.

4.7.3 Effect of an interpretative declaration approved by all the contracting States and contracting organizations

An interpretative declaration that has been approved by all the contracting States and contracting organizations may constitute an agreement regarding the interpretation of the treaty.

5. Reservations, acceptances of reservations, objections to reservations, and interpretative declarations in cases of succession of States

5.1 Reservations in cases of succession of States

5.1.1 Newly independent States

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation.

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1.

3. When a newly independent State formulates a reservation in conformity with paragraph 2, the relevant rules set out in Part 2 (Procedure) of the Guide to Practice apply in respect of that reservation.

4. For the purposes of this Part of the Guide to Practice, "newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

5.1.2 Uniting or separation of States

1. Subject to the provisions of guideline 5.1.3, a successor State which is a party to a treaty as the result of a uniting or separation of States shall be considered as maintaining any reservation to the treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates, unless it expresses its intention not to maintain one or more reservations of the predecessor State at the time of the succession.

2. A successor State which is a party to a treaty as the result of a uniting or separation of States may neither formulate a new reservation nor widen the scope of a reservation that is maintained.

3. When a successor State formed from a uniting or separation of States makes a notification whereby it establishes its status as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State, that State shall be considered as maintaining any reservation to the treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates, unless it expresses a contrary intention when making the notification or formulates a reservation which relates to the same subject matter as that reservation. That successor State may formulate a new reservation to the treaty.

4. A successor State may formulate a reservation in accordance with paragraph 3 only if the reservation is one the formulation of which would not be excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1. The relevant rules set out in Part 2 (Procedure) of the Guide to Practice apply in respect of that reservation.

5.1.3 Irrelevance of certain reservations in cases involving a uniting of States

When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State, such reservations as may have been formulated by any such State which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.

5.1.4 Maintenance of the territorial scope of reservations formulated by the predecessor State

Subject to the provisions of guideline 5.1.5, a reservation considered as being maintained in conformity with guideline 5.1.1, paragraph 1, or guideline 5.1.2, paragraph 1 or 3, shall retain the territorial scope that it had at the date of the succession of States, unless the successor State expresses a contrary intention.

5.1.5 Territorial scope of reservations in cases involving a uniting of States

1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of only one of the States forming the successor State becomes applicable to a part of the territory of that State to which it did not apply previously, any reservation considered as being maintained by the successor State shall apply to that territory unless:

(a) the successor State expresses a contrary intention when making the notification extending the territorial scope of the treaty; or

(b) the nature or purpose of the reservation is such that the reservation cannot be extended beyond the territory to which it was applicable at the date of the succession of States.

2. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of two or more of the uniting States becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States, no reservation shall extend to that territory unless:

(a) an identical reservation has been formulated by each of those States in respect of which the treaty was in force at the date of the succession of States;

(b) the successor State expresses a different intention when making the notification extending the territorial scope of the treaty; or

(c) a contrary intention otherwise becomes apparent from the circumstances surrounding that State's succession to the treaty.

3. A notification purporting to extend the territorial scope of a reservation in accordance with paragraph 2 (b) shall be without effect if such an extension would give rise to the application of contradictory reservations to the same territory.

4. The provisions of paragraphs 1 to 3 apply *mutatis mutandis* to reservations considered as being maintained by a successor State that is a contracting State, following a uniting of States, to a treaty which was not in force for any of the uniting States at the date of the succession of States but to which one or more of those States were contracting States at that date, when the treaty becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States.

5.1.6 Territorial scope of reservations of the successor State in cases of succession involving part of territory

When, as a result of a succession of States involving part of the territory of a State, a treaty to which the successor State is a contracting State becomes applicable to that territory, any reservation to the treaty formulated previously by that State shall also apply to that territory as from the date of the succession of States unless:

(a) the successor State expresses a contrary intention; or

(b) it appears from the reservation that its scope was limited to the territory of the successor State that was within its borders prior to the date of the succession of States, or to a part of this territory.

5.1.7 Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State

The non-maintenance, in conformity with guideline 5.1.1 or 5.1.2, by the successor State of a reservation formulated by the predecessor State becomes operative in relation to another contracting State or a contracting organization only when notice of it has been received by that State or organization.

5.1.8 Late formulation of a reservation by a successor State

A reservation shall be considered as late if it is formulated:

(a) by a newly independent State after it has made a notification of succession to the treaty;

(b) by a successor State other than a newly independent State after it has made a notification establishing its status as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State; or

(c) by a successor State other than a newly independent State in respect of a treaty which, following the succession of States, continues in force for that State.

5.2 Objections to reservations in cases of succession of States

5.2.1 Maintenance by the successor State of objections formulated by the predecessor State

Subject to the provisions of guideline 5.2.2, a successor State shall be considered as maintaining any objection formulated by the predecessor State to a reservation formulated by a contracting State or contracting organization, unless it expresses a contrary intention at the time of the succession.

5.2.2 Irrelevance of certain objections in cases involving a uniting of States

1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the State so formed, such objections to a reservation as may have been formulated by any of those States in respect of which the treaty was not in force on the date of the succession of States shall not be maintained.

2. When, following a uniting of two or more States, the successor State is a contracting State to a treaty to which it has maintained reservations in conformity with guideline 5.1.1 or 5.1.2, objections to a reservation made by another contracting State or a contracting organization shall not be maintained if the reservation is identical or equivalent to a reservation which the successor State itself has maintained.

5.2.3 Maintenance of objections to reservations of the predecessor State

When a reservation formulated by the predecessor State is considered as being maintained by the successor State in conformity with guideline 5.1.1 or 5.1.2, any objection to that reservation formulated by another contracting State or by a contracting organization shall be considered as being maintained in respect of the successor State.

5.2.4 Reservations of the predecessor State to which no objections have been made

When a reservation formulated by the predecessor State is considered as being maintained by the successor State in conformity with guideline 5.1.1 or 5.1.2, a State or an international organization that had not formulated an objection to the reservation in respect of the predecessor State may not object to it in respect of the successor State, unless:

(a) the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period; or

(b) the territorial extension of the treaty radically changes the conditions for the operation of the reservation.

5.2.5 Right of a successor State to formulate objections to reservations

1. When making a notification of succession establishing its status as a contracting State, a newly independent State may, in accordance with the relevant guidelines, formulate an objection to reservations formulated by a contracting State or a contracting organization, even if the predecessor State made no such objection.

2. A successor State, other than a newly independent State, shall also have the right provided for in paragraph 1 when making a notification establishing its status as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State.

3. The right referred to in paragraphs 1 and 2 is nonetheless excluded in the case of treaties falling under guidelines 2.8.7 and 4.1.2.

5.2.6 Objections by a successor State other than a newly independent State in respect of which a treaty continues in force

A successor State, other than a newly independent State, in respect of which a treaty continues in force following a succession of States may not formulate an objection to a reservation to which the predecessor State had not objected, unless the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period.

5.3 Acceptances of reservations in cases of succession of States

5.3.1 Maintenance by a newly independent State of express acceptances formulated by the predecessor State

When a newly independent State establishes its status as a contracting State to a treaty, it shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization, unless it expresses a contrary intention within twelve months of the date of the notification of succession.

5.3.2 Maintenance by a successor State other than a newly independent State of express acceptances formulated by the predecessor State

1. A successor State, other than a newly independent State, in respect of which a treaty continues in force following a succession of States shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization.

2. When making a notification of succession establishing its status as a contracting State to a treaty which, on the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State, a successor State other than a newly independent State shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or a contracting organization, unless it expresses a contrary intention within twelve months of the date of the notification of succession.

5.3.3 Timing of the effects of non-maintenance by a successor State of an express acceptance formulated by the predecessor State

The non-maintenance, in conformity with guideline 5.3.1 or guideline 5.3.2, paragraph 2, by the successor State of the express acceptance by the predecessor State of a reservation formulated by a contracting State or a contracting organization becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

5.4 Legal effects of reservations, acceptances and objections in cases of succession of States

1. Reservations, acceptances and objections considered as being maintained pursuant to the guidelines contained in this Part of the Guide to Practice shall continue to produce their legal effects in conformity with the provisions of Part 4 of the Guide.

2. Part 4 of the Guide to Practice is also applicable, *mutatis mutandis*, to new reservations, acceptances and objections formulated by a successor State in conformity with the provisions of the present Part of the Guide.

5.5 Interpretative declarations in cases of succession of States

1. A successor State should clarify its position concerning interpretative declarations formulated by the predecessor State. In the absence of such clarification, a successor State shall be considered as maintaining the interpretative declarations of the predecessor State.

2. Paragraph 1 is without prejudice to cases in which the successor State has demonstrated, by its conduct, its intention to maintain or to reject an interpretative declaration formulated by the predecessor State.

Annex
Conclusions on the reservations dialogue

The International Law Commission,

Recalling the provisions on reservations to treaties contained in the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,

Taking into account the seventeenth report[1] presented by the Special Rapporteur on the topic "Reservations to treaties", which addresses the question of the reservations dialogue,

Bearing in mind the need to achieve a satisfactory balance between the objectives of safeguarding the integrity of multilateral treaties and securing the widest possible participation therein,

Recognizing the role that reservations to treaties may play in achieving this balance,

Concerned at the number of reservations that appear incompatible with the limits imposed by the law of treaties, in particular article 19 of the Vienna Conventions on the Law of Treaties,

Aware of the difficulties raised by the assessment of the validity of reservations,

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[1] A/CN.4/647, paras. 2 to 68.

Convinced of the usefulness of a pragmatic dialogue with the author of a reservation,

Welcoming the efforts made in recent years, including within the framework of international organizations and human rights treaty bodies, to encourage such a dialogue,

I. Considers that:

1. States and international organizations intending to formulate reservations should do so as precisely and narrowly as possible, consider limiting their scope and ensure that they are not incompatible with the object and purpose of the treaty to which they relate;

2. In formulating a unilateral statement, States and international organizations should indicate whether it amounts to a reservation and, if so, explain why the reservation is deemed necessary and the effect it will have on the fulfilment by its author of its obligations under the treaty;

3. Statements of reasons by the author of a reservation are important for the assessment of the validity of the reservation, and States and international organizations should state the reason for any modification of a reservation;

4. States and international organizations should periodically review their reservations with a view to limiting their scope or withdrawing them where appropriate;

5. The concerns about reservations that are frequently expressed by States and international organizations, as well as monitoring bodies, may be useful for the assessment of the validity of reservations;

6. States and international organizations, as well as monitoring bodies, should explain to the author of a reservation the reasons for their concerns about the reservation and, where appropriate, request any clarification that they deem useful;

7. States and international organizations, as well as monitoring bodies, if they deem it useful, should encourage the withdrawal of reservations, the reconsideration of the need for a reservation or the gradual reduction of the scope of a reservation through partial withdrawals;

8. States and international organizations should address the concerns and reactions of other States, international organizations and monitoring bodies and take them into account, to the extent possible, with a view to reconsidering, modifying or withdrawing a reservation;

9. States and international organizations, as well as monitoring bodies, should cooperate as closely as possible in order to exchange views on reservations in respect of which concerns have been raised and coordinate the measures to be taken; and

II. Recommends that:

The General Assembly call upon States and international organizations, as well as monitoring bodies, to initiate and pursue such a reservations dialogue in a pragmatic and transparent manner.

2. Text of the Guide to Practice, comprising an introduction, the guidelines and commentaries thereto, an annex on the reservations dialogue and a bibliography

2. The text of the Guide to Practice on Reservations to Treaties, comprising an introduction, the guidelines and commentaries thereto, an annex on the reservations dialogue and a bibliography, is reproduced below:

Guide to Practice on Reservations to Treaties

(a) Introduction

(1) The Guide to Practice on Reservations to Treaties consists of guidelines that have been adopted by the Commission[2] and are reproduced below, accompanied by commentaries. Although they do not have the same weight as the guidelines themselves, the commentaries are an integral part of the Guide and an indispensable supplement to the guidelines, which they expand and explain. In such a highly technical and particularly complex area, it is impossible to address all the questions that might arise or provide all the explanations that might be helpful to practitioners in any concise provisions, however numerous they might be.[3]

(2) As its name indicates, the purpose of the Guide to Practice is to provide assistance to practitioners of international law, who are often faced with sensitive problems concerning, in particular, the validity and effects of reservations to treaties — a matter on which the rules contained in the 1969, 1978 and 1986[4] Vienna Conventions have gaps and are often unclear — and, to a lesser extent, interpretative declarations in respect of treaty provisions, of which these Conventions make no mention whatsoever. The purpose of this Guide is not — or, in any case, not only — to offer the reader a guide to past (and often uncertain) practice in this area, but rather to direct the user towards solutions that are consistent with existing rules (where they exist) or to the solutions that seem most appropriate for the progressive development of such rules.

(3) In that connection, it should be stressed that while the Guide to Practice, as an instrument — or "formal source" — is by no means binding, the various provisions in the guidelines cover a wide range of obligatoriness and have very different legal values.[5]

- Some of them simply reproduce provisions of the Vienna Conventions which set out norms that were either uncontroversial[6] at the time of their inclusion in the Conventions[7] or have since become so[8] as such, while not peremptory in nature, they are nevertheless binding on all States or international organizations, whether or not they are parties to the Conventions;

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[2] See para. 61 of the present report (A/66/10).

[3] The present Guide contains 179 guidelines.

[4] The 1986 Vienna Convention (A/CONF.129/15) is not yet in force.

[5] This range is too great, and the distribution of guidelines among the various categories is too imprecise, to make it possible to follow a frequent suggestion — made, *inter alia*, during discussions in the Sixth Committee of the General Assembly — that a distinction should be made between guidelines reflecting *lex lata* and those formulated *de lege ferenda*.

[6] This is the case, for example, of the fundamental rule that a State or international organization may not formulate a reservation that is incompatible with the object and purpose of the treaty; it is set out in article 19 (c) of the 1969 and 1986 Conventions and reproduced in guideline 3.1.

[7] See, for example, guideline 2.5.1 (Withdrawal of reservations), which reproduces the rules set out in article 22, paragraph 1, and article 23, paragraph 4, of the 1969 and 1986 Vienna Conventions, respectively.

- Other rules contained in the Vienna Conventions are binding on the parties thereto, but their customary nature is open to question;[9] reproducing them in the Guide to Practice should contribute to their crystallization as customary rules;
- In some cases, guidelines included in the Guide supplement Convention provisions that are silent on modalities for their implementation but these rules are themselves indisputably customary in nature[10] or are required for obvious logical reasons;[11]
- In other cases, the guidelines address issues on which the Conventions are silent but set out rules the customary nature of which is hardly in doubt;[12]
- At times, the rules contained in the guidelines are clearly set out *de lege ferenda*[13] and, in some cases, are based on practices that have developed in the margins of the Vienna Conventions;[14]
- Other rules are simply recommendations and are meant only to encourage.[15]

(4) This last category of the guidelines highlights one of the key characteristics of the Guide to Practice. Such provisions would not have been included in a traditional set of draft articles intended to be transformed, if appropriate, into a treaty: treaties are not drafted in the conditional tense.[16] But the problem here is somewhat different: as the title and the word "guidelines" indicate, it is not a binding instrument but a *vade mecum*, a "toolbox" in which the negotiators of treaties and those responsible for implementing them should find answers to the practical questions raised by reservations, reactions to reservations and interpretative declarations, on the understanding that, under positive law, these answers may be more or less

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[8] The rule set out in guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty), which reproduces, *mutatis mutandis*, article 23, paragraph 2, of the Vienna Conventions, appears to have acquired customary status since the adoption of the 1969 Convention.

[9] This is largely true of guidelines 2.1.3 (Representation for the purpose of formulating a reservation at the international level); 2.1.5 (Communication of reservations), which reproduces, *mutatis mutandis*, the wording of articles 7 and 23 of the 1986 Vienna Convention; and 2.6.12 (Time period for formulating objections).

[10] The definition of "specified reservations" by guideline 3.1.2 may be said to have acquired customary status. See also guideline 3.1.5.7 (Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty).

[11] See, for example, guideline 2.8.7 (Unanimous acceptance of reservations), which draws the obvious conclusion from article 20, paragraph 3, of the 1969 and 1986 Conventions.

[12] See, for example, guideline 4.4.2 (Absence of effect on rights and obligations under customary international law).

[13] See, for example, guidelines 1.2.1 (Interpretative declarations formulated jointly) and 3.4.2 (Permissibility of an objection to a reservation).

[14] See, for example, guidelines 4.2.2 (Effect of the establishment of a reservation on the entry into force of the treaty) and 4.3.7 (Effect of an objection on provisions other than those to which the reservation relates).

[15] These are always drafted in the conditional tense; see, for example, guidelines 2.1.2 (Statement of reasons for reservations) and 2.5.3 (Periodic review of the usefulness of reservations).

[16] There may be exceptions to this; see article 7 of the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat, concluded in Ramsar (Islamic Republic of Iran), and article 16 of the 2004 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; they are rarely justified.

certain depending on the question, and that the commentaries indicate doubts that may exist as to the certainty or appropriateness of a solution.

(5) In light of these characteristics, it goes without saying that the rules set out in the Guide to Practice in no way prevent States and international organizations from setting aside, by mutual agreement, those that they consider inappropriate to the purposes of a given treaty. The rules set out in the Guide are, at best, residual rules. In any event, since none of them has a peremptory *jus cogens* nature, a derogation to which all interested States (or international organizations) consent is always an option.

(6) In a consensus decision reached in 1995 and never subsequently challenged, the Commission considered that there was no reason to modify or depart from the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions[17] in drafting the Guide to Practice, which incorporates all of them. But this also had implications for the very concept of the Guide and, in particular, for the commentaries to the guidelines.

(7) In so far as the intent is to preserve and apply the Vienna rules, it was necessary to clarify them. For this reason, the commentaries describe extensively the *travaux préparatoires* to the three Conventions, which help clarify their meaning and explain the gaps contained therein.

(8) Generally speaking, the commentaries are long and detailed. In addition to an analysis of the *travaux préparatoires* to the Vienna Conventions, they include a description of the relevant jurisprudence, practice and writings and explanations of the wording that was ultimately adopted; the commentaries provide numerous examples. Their length, which has often been criticized, appears necessary in light of the highly technical and complex nature of the issues raised. The Commission hopes that practitioners will indeed find answers to any questions that may arise.[18]

(9) The Guide to Practice is divided into five Parts (numbered 1 to 5), which follow a logical order:

- Part 1 is devoted to the definition of reservations and interpretative declarations and to the distinction between these two types of unilateral statement; it also includes an overview of various unilateral statements, made in connection with a treaty, that are neither reservations nor interpretative declarations, and of possible alternatives to both; as expressly stated in guideline 1.8, "The[se] definitions ... are without prejudice to the validity and legal effects" of the statements covered by Part 1;
- Part 2 sets out the form and procedure to be used in formulating reservations and interpretative declarations and reactions thereto (objections to and acceptances of reservations and approval or recharacterization of, or opposition to, interpretative declarations);
- Part 3 concerns the permissibility of reservations and interpretative declarations and reactions thereto and sets out the criteria for the assessment of permissibility; these are illustrated by examples, with commentary, of the types of reservations that most often give rise to differences of opinion among States regarding their permissibility. Some guidelines also specify the modalities for assessing the permissibility of reservations and the consequences of their impermissibility;

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[17] *Yearbook ... 1995*, vol. II, Part Two, para. 467.

[18] It is also for this reason that the Commission did not hesitate to allow a certain amount of repetition to remain in the commentaries in order to facilitate consultation and use of the Guide to Practice.

- Part 4 is devoted to the legal effects produced by reservations and interpretative declarations, depending on whether they are valid (in which case a reservation is "established" if it has been accepted) or not; this part also analyses the effects of objections to and acceptances of reservations;
- Part 5 supplements the only provision of the 1978 Vienna Convention on Succession of States in respect of Treaties that deals with reservations — article 20 on the fate of reservations in the case of succession of States by a newly independent State — and extrapolates and adapts solutions for cases of uniting or separation of States; this last part also covers the issues raised by objections to or acceptances of reservations and by interpretative declarations in relation to succession of States;
- Lastly, the text of the conclusions and a recommendation adopted by the Commission on the reservations dialogue is reproduced in an annex to the Guide to Practice. A bibliography is also attached to the Guide.

(10) Within each part, the guidelines are divided into sections (introduced by a two-digit number where the first represents the part and the second the section within that part[19]). In principle, the guidelines carry a three-digit number within each section.[20]

(b) Text of the guidelines with commentaries thereto

1. Definitions

1.1 Definition of reservations

1. "Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

2. Paragraph 1 is to be interpreted as including reservations which purport to exclude or to modify the legal effect of certain provisions of a treaty, or of the treaty as a whole with respect to certain specific aspects, in their application to the State or to the international organization which formulates the reservation.

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[19] For example, section 3.4 deals with the "Permissibility of reactions to reservations"; the number 3 indicates that it falls under Part 3 and the number 4 refers to section 4 of that Part. Where a section is introduced by a guideline of a very general nature that covers its entire content, that guideline has the same title and the same number as the section itself (this is true, for example, of guideline 3.5 ("Permissibility of an interpretative declaration").

[20] In the exceptional case of the guidelines designed to illustrate, through examples, the question of the incompatibility of a reservation with the object and purpose of the treaty (the subject of guideline 3.1.5), these illustrative guidelines have a four-digit number. Thus, in the case of guideline 3.1.5.1 (Determination of the object and purpose of the treaty), the number 3 refers to Part 3; the first number 1 refers to section 1 of this part ("Permissible reservations"); the number 5 refers to the more general guideline 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty) and the second number 1 indicates that this is the first example illustrating that general guideline.

Commentary

(1) Paragraph 1 of guideline 1.1 contains the definition of reservations adopted by the Commission. It is no more than a composite text of the definitions contained in the Vienna Conventions of 1969, 1978 and 1986, to which no changes have been made. Paragraph 2 reflects the extensive interpretation which has been given to this definition in practice.

(2) Article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties of 23 May 1969 gives the following definition of reservations:

> "'Reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."

(3) This definition reproduces the text proposed by the Commission in 1966 in its final draft articles on the law of treaties,[21] and did not give rise to lengthy discussion either within the Commission[22] or during the Vienna Conference. The text of the definition was reproduced in the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1986 Vienna Convention on Treaties between States and International Organizations or between International Organizations[23] and gave rise to hardly any discussion.

(4) It should be noted, however, that article 2, paragraph 1 (j), of the 1978 Convention and article 2, paragraph (1) (d), of the 1986 Convention do not purely and simply reproduce the text of article 2, paragraph (1) (d), of the 1969 definition. Each of them includes a clarification made necessary by the respective purposes of the two instruments:

(a) The 1978 Convention specifies that a reservation can be made by a State "when making a notification of succession to a treaty";

(b) The 1986 Convention adds that an international organization can make a reservation when it expresses its consent to be bound by a treaty by an act of formal confirmation.

(5) It is these differences that made it necessary to establish for the purposes of the Guide to Practice a composite text, including the additions made in 1978 and 1986, rather than purely and simply to reproduce the 1969 text.

(6) This definition, embodied in judicial decisions[24] and used in practice by States when making reservations or reacting to reservations made by other contracting States, has met with

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[21] *Yearbook … 1966*, vol. II, p. 187.

[22] See the definitions proposed by Brierly (*Yearbook … 1950*, vol. II, doc. A/CN.4/23, para. 84), Fitzmaurice (*Yearbook … 1956*, vol. II, p. 112) and Waldock (*Yearbook … 1962*, vol. II, p. 36) and the proposals of the Drafting Committee of 1962 (*Yearbook … 1962*, vol. I, p. 264) and 1965 (*Yearbook … 1965*, vol. I, p. 335).

[23] During the Commission's elaboration of the draft articles on this topic, a simplification of the definition was proposed in order to avoid a lengthy enumeration of the moments when a reservation may be made in accordance with the 1969 definition (see *Yearbook … 1974*, vol. II, part I, p. 306). In 1981, however, the Commission reverted to a text based on the 1969 text (see *Yearbook … 1981*, vol. II, part II, pp. 122 and 124).

[24] See, for example, the arbitral decision of 30 June 1977, *Case concerning the delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, United Nations, *Reports of International Arbitral Awards*, vol. XVIII, paras. 54–55, pp. 39–40 (the Court of Arbitration had taken note of the parties' agreement to consider that article 2, paragraph (1) (d), of the 1969 Convention, to which they were not parties, correctly defined the reservations, and had drawn the necessary conclusions) or the Decision of

general approval in the writings of legal scholars, even though some authors have criticized it on specific points and have suggested certain additions or amendments.[25]

(7) It has been said that this definition combined elements that were purely definitional with others that were more closely identified with the legal regime of reservations, particularly with regard to the moment when a reservation may be formulated. Illogical though it may appear in the abstract, the idea of including time limits on the possibility of making reservations in the definition of reservations itself has progressively gained ground,[26] given the magnitude of the drawbacks in terms of stability of legal relations of a system that would allow parties to formulate a reservation at any moment. It is in fact the principle *pacta sunt servanda* itself which would be called into question, in that at any moment a party to a treaty could, by formulating a reservation, call its treaty obligations into question.

(8) The fact nonetheless remains that criticisms have been levelled at the restrictive listing in the Vienna Conventions of the moments at which formulation of a reservation can take place. On the one hand, it has been felt that it was incomplete, *inter alia*, in that it did not initially take into account the possibility of formulating a reservation on the occasion of a succession of States;[27] but the 1978 Vienna Convention on Succession of States in respect of Treaties remedied this omission. Moreover, many authors have pointed out that, in some cases, reservations could validly be formulated at moments other than those provided for in the Vienna definition,[28] and in particular that a treaty may make express provision for the possibility of formulating a reservation at a moment other than the time of signature or of expression of consent to be bound by the treaty.[29]

(9) Express consideration of this possibility in the Guide to Practice does not, however, appear to be useful: it is indeed true that a treaty may provide for such an eventuality, but this is then a treaty rule, a *lex specialis* that constitutes a derogation from the general principles established by the Vienna Conventions, which are only intended to substitute for an absence of will, and present no impediment to derogations of this kind. The Guide to Practice on

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5 May 1982 of the European Commission of Human Rights, *Case concerning Temeltasch* (Decisions and Reports), April 1983, paras. 69–82, pp. 130–131. See also the Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock attached to the judgment in the *Nuclear Tests (Australia v. France)* case (*I.C.J. Reports 1974*, pp. 349–350, para. 83).

[25] See in particular the definitions proposed by Pierre-Henri Imbert, *Les réserves aux traités multilatéraux* (Paris, Pedone, 1979), p. 18, and Marjorie Whiteman, *Digest of International Law*, vol. 14, 1970, p. 137. See also Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5, 1988, p. 83.

[26] The oldest definitions of reservations did not generally include this element *ratione temporis* (see, for example, those proposed by David Hunter Miller (*Reservations to Treaties: The Effect and Procedure in Regard Thereto*, Washington D. C., 1919, p. 76), Dionisio Anzilotti (*Cours de droit international*, French translation by G. Gidel, Paris, Sirey, vol. I, 1929, p. 399) and Raoul Genet ("Les réserves dans les traités", *Revue de droit international et des sciences diplomatiques et politiques*, 1932, p. 103)).

[27] Cf. Renata Szafarz, "Reservations to Multilateral Treaties", *The Polish Yearbook of International Law*, 1970, p. 295.

[28] Cf. *ibid.* and Giorgio Gaja, "Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification – Études en l'honneur de Roberto Ago* (Milan, Giuffrè, 1987), vol. I, pp. 310–313; D.W. Greig, "Reservations: Equity as a Balancing Factor?", *Australian Yearbook of International Law*, 1995, pp. 28–29; F. Horn, footnote 25 above, pp. 41–43; and Paul Reuter, *Introduction au droit des traités*, 3rd ed., revised and expanded by Philippe Cahier (Paris, P.U.F., 1995), p. 71.

[29] See in particular P.-H. Imbert, footnote 25 above, p. 12.

Reservations to Treaties is of the same nature, and it does not seem appropriate to recall under each of its headings that States and international organizations may depart from it by including in the treaties that they conclude reservations clauses which institute special rules in that respect.

(10) On the other hand, even if one confines oneself to general international law it appears that the list of cases in which the formulation of a reservation can take place, as laid down in article 2, paragraph 1, of the Vienna Conventions, does not cover all the means of expressing consent to be bound by a treaty. Yet the spirit of this provision is indeed that a State may formulate (or confirm) a reservation when it expresses its consent, and that it can do so only at that moment. Too much importance must not therefore be attached to the letter of this enumeration, which is incomplete and, moreover, does not correspond to that appearing in article 11 of the 1969 and 1986 Conventions.[30]

(11) The Commission had moreover clearly perceived the problem when it discussed the draft articles on the law of treaties between States and international organizations or between international organizations, in that initially, on the proposal of its Special Rapporteur, Reuter, it had simplified the definition of reservations and intended to say only that they could be made by "a State or by an international organization when signing or consenting ... to be bound by a treaty",[31] which was an implicit reference to article 11 of the future Convention. However, out of a concern to depart as little as possible from the 1969 text, the Commission finally modelled its draft on it, thus abandoning the idea of a useful simplification.[32]

(12) The differences in wording between article 2, paragraph 1 (d), and article 11 of the 1969 and 1986 Conventions lie in the omission from the former of these provisions of two possibilities contemplated in the latter: "exchange of instruments constituting a treaty" and "any other means if so agreed". It is rather improbable that a general multilateral treaty could consist of an exchange of letters. Nevertheless, the possibility cannot be entirely ruled out; nor can the development of means of expressing consent to be bound by a treaty other than those expressly listed in articles 2, paragraph 1 (d), and 11 of the Vienna Conventions.

(13) It was also suggested that the definition of reservations should be supplemented by a mention of the requirement that reservations must be made in writing and that it should be made clear that a reservation could — in fact could only — seek to limit the legal effect of the provisions in respect of which it is made.

(14) These gaps and ambiguities do not constitute sufficient grounds to call into question the Vienna definition as derived from a combination of the relevant provisions of the 1969,

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[30] Article 11 of the Vienna Conventions reads as follows:

> "1. The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.
>
> 2. The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed."

See also Philippe Gautier, Commentaire de l'Article 2 (1969), in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités: Commentaires article par article* (Brussels, Bruylant, 2006), vol. I, p. 65, para. 33; and Philippe Gautier, 1969 Vienna Convention Article 2, in Olivier Corten and Pierre Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (New York, Oxford University Press, 2011), vol. I, p. 46, para. 34.

[31] *Yearbook ... 1974*, vol. II, Part I, p. 145; see also the commentary on the draft in question, *ibid.*, p. 307.

[32] See footnote 23 above.

1978 and 1986 Vienna Conventions. To the extent necessary, this definition is supplemented and clarified in the Guide to Practice, since that is the very purpose and *raison d'être* of the Guide.[33]

(15) Taken literally, the Vienna definition which the Commission has included in paragraph 1 appears to exclude from the general category of reservations unilateral statements that concern not one specific provision or a number of provisions of a treaty, but the entire text. Such an interpretation would have the effect of excluding from the definition of reservations the well-established practice of across-the-board reservations, which guideline 1.1, paragraph 2, seeks to take into account.

(16) The wording used by the authors of the Vienna Conventions takes care to make it clear that the objective of the author of the reservation is to exclude or to modify the *legal effect* of certain provisions of the treaty to which the reservation applies and not the provisions themselves.[34] A criticism of the wording relates to the use of the expression "certain provisions". It has been noted that this expression was justified "out of the very commendable desire to exclude reservations that are too general and imprecise[35] and that end up annulling the binding character of the treaty", a consideration regarding which it might be queried whether it "should be placed in article 2. In fact, it relates to the validity of reservations. However, it is not because a statement entails impermissible consequences that it should not be considered a reservation. Moreover, practice provides numerous examples of perfectly valid reservations that do not focus on specific provisions: they exclude the application of the treaty as a whole under certain well-defined circumstances".[36]

(17) Care should be taken not to confuse, on the one hand, a general reservation characterized by the lack of precision and general nature of its content and, on the other, an across-the-board reservation concerning the way in which the State or the international organization formulating it intends to apply the treaty as a whole, but which cannot necessarily be criticized for lack of precision, since it relates to a specific particular of the treaty.

(18) Across-the-board reservations are a standard practice and, as such, have not raised particular objections. The same is true of reservations that exclude or limit the application of a treaty:

- to certain categories of persons;[37]

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[33] See in particular guidelines 1.1.1, 2.1.1 and 2.3.

[34] The wording of article 21, paragraph 1, of the 1969 and 1986 Conventions is more open to question, in that it defines the legal effects of reservations as amendments *to the provisions* to which they refer.

[35] Cf. the observations of the Government of Israel on the first draft of the International Law Commission (*Yearbook ... 1965*, vol. II, p. 14) or the statement by the representative of Chile at the first session of the Vienna Conference, in 1968 (*Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, A/CONF.39/11, (United Nations, New York, 1969, Sales No. E.68.V.7) 4th meeting, para. 5). See also K. Zemanek, "Alain Pellet's Definition of a Reservation", *Austrian Review of International and European Law*, vol. 3, 1998, pp. 295–299.

[36] P.-H. Imbert, footnote 25 above, pp. 14–15. Similarly, see, for example, R. Szafarz, footnote 27 above, p. 296.

[37] See, for example, the United Kingdom's reservation concerning the application of the International Covenant on Civil and Political Rights to members of the armed forces and prisoners (*Multilateral treaties deposited with the Secretary-General*, available from

- or of objects, especially vehicles;[38]
- or to certain situations;[39]
- or to certain territories;[40]
- or in certain specific circumstances;[41]
- or for special reasons relating to the international status of their author;[42]
- or to the author's national laws;[43] etc.

(19) Some of these reservations have given rise to objections on grounds of their general nature and lack of precision,[44] and it may be that some of them are tainted by impermissibility

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http://treaties.un.org/, chap. IV.4) or that of Guatemala concerning the application of the Customs Convention on the Temporary Importation of Private Road Vehicles of 4 June 1954 to natural persons only (*ibid.*, chap. XI.A.8).

[38] See, for example, Yugoslavia's reservation to the effect that the provisions of the Convention relating to the Unification of Certain Rules concerning Collisions in Inland Navigation shall not apply to vessels exclusively employed by the public authorities (*ibid.*, chap. XII.3) or that of the Federal Republic of Germany to the effect that the Convention on the Registration of Inland Navigation Vessels of 25 January 1965 would not apply to vessels navigating on lakes and belonging to the German Federal Railways (*ibid.*, chap. XII.4).

[39] See, for example, the Argentine reservations to the 1982 Convention of the International Telecommunication Union with regard to the possible increase in its contribution and the possibility that the other parties would not observe their obligations under the Convention (reply by Argentina to the Commission's questionnaire on reservations to treaties); or the reservation of France on signature of the final proceedings of the Regional Administrative Conference for the Planning of Maritime Radiobeacons in the European Maritime Area in 1985, concerning the requirements for the adequate operation of the French maritime radio-navigation service using the multifrequency phase metering system (reply by France to the same questionnaire on reservations) prepared by the Special Rapporteur pursuant to a decision of the Commission reflected in paragraph 489 of its report on the work of its forty-seventh session (1995), *Yearbook ... 1995*, vol. II, Part Two, p. 108.

[40] See also guideline 1.1.3 below.

[41] See France's reservation to the General Act of Arbitration of 26 September 1928 to the effect that "in future [the said accession to the Act] shall not extend to disputes relating to any events that may occur in the course of a war in which the French Government is involved" (*Multilateral Treaties ... ibid.*, chap. II.19). (Similar reservations were made by the United Kingdom and New Zealand.) See also the reservations of the majority of States parties to the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, whereby that instrument would cease to be binding for the Government of the State making a reservation with regard to any enemy State whose armed forces or whose allies did not respect the prohibitions which were the object of the Protocol. *Status of Multilateral Arms Regulation and Disarmament Agreements*, 4th ed., 1992, vol. I, pp. 11–21.

[42] See, for example, Austria's and Switzerland's reservations to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of 10 April 1972, with regard to preserving their status of neutrality (Swiss reply to the questionnaire on reservations) (United Nations, *Treaty Series*, vol. 1015, p. 236) or Austria's similar reservation to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 10 December 1976 (*Multilateral Treaties ...*, chap. XXVI.1).

[43] See, for example, the reservations of the United States of America, Italy and Japan to the effect that those countries would apply the International Wheat Agreement of 14 March 1986 provisionally within the limitations of internal legislation (*ibid.*, chap. XIX.28) or the reservation of Canada to the Convention on the Political Rights of Women of 31 March 1953 "in respect of rights within the legislative jurisdiction of the provinces" (*ibid.*, chap. XVI.1).

for one of the reasons specified in article 19 of the 1969 and 1986 Vienna Conventions. But this impermissibility stems from the legal regime of the reservations and is a separate problem from that of their definition.[45] Furthermore, the inclusion of across-the-board reservations in the category of reservations constitutes an indispensable prerequisite to assessing their validity under the rules relating to the legal regime governing reservations; an impermissible reservation (1) is still a reservation and (2) cannot be declared impermissible unless it is a reservation.

(20) Another element that supports a non-literal interpretation of the Vienna definition relates to the fact that some treaties prohibit across-the-board reservations or certain categories of such reservations, in particular general reservations.[46] Such a provision would be superfluous (and inexplicable) if unilateral statements designed to modify the legal effect of a treaty as a whole, at least with respect to certain specific aspects, did not constitute reservations.

(21) The abundance and coherence of the practice of across-the-board reservations (which are not always imprecise and general reservations) and the absence of objections in principle to this type of reservations indicate a practical need that it would be absurd to challenge in the name of abstract legal logic. Moreover, the interpretation of rules of law should not be static; article 31, paragraph 3, of the Vienna Convention invites the interpreter of treaty rules to take into account, "together with the context: ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", and, as the International Court of Justice has stressed, a legal principle must be interpreted in the light of "the subsequent development of international law".[47]

(22) In order to remove any ambiguity and avoid any controversy, it consequently appears reasonable and useful to establish, in the Guide to Practice, the broad interpretation that States actually give to the apparently restrictive formula of the Vienna definition.

(23) Furthermore, in order to avoid any confusion with declarations relating to the implementation of a treaty at the internal level, which is the subject of guideline 1.5.2, or even with other unilateral declarations,[48] the Commission decided not to include any reference to "the way in which the State or international organization intends to implement the treaty as a

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[44] See, for example, the objections of numerous countries to the reservations made by the Maldives to the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 concerning the Islamic Shariah (*ibid.*, chap. IV.8) and also the reservations made by Egypt to the same Convention. See, in this respect, the articles by Anna Jenefsky, "Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discrimination against Women", *Maryland Journal of International Law and Trade*, vol. 15, 1991, pp. 199–233, and by R. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination against Women", *Virginia Journal of International Law*, vol. 30, 1990, pp. 643–716. See also the objections of certain countries to the reservation of the United States of America to the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948, relating to the Constitution of the United States (*Multilateral Treaties ...*, chap. IV.1).

[45] See also guideline 1.8 and commentary thereto.

[46] This is so in the case of article 57, paragraph 1 (formerly article 64, paragraph 1), of the European Convention on Human Rights or article XIX of the Inter-American Convention on Forced Disappearance of Persons.

[47] Advisory Opinion of 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 16, para. 53.

[48] See in particular the case of general statements of policy (paras. (12) to (17) of the commentary to guideline 1.5).

whole". It confined itself to using the actual text of the Vienna definition, according to which, when it formulates a reservation, a State or international organization "purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization", specifying, however, that the same may also apply if the reservation relates to "the treaty as a whole with respect to certain specific aspects". The addition of the words "with respect to certain specific aspects" after the words "or of the treaty as a whole" is designed to avoid an interpretation that implies that a reservation might relate to the treaty as a whole, which could go so far as to void it of any substance.

(24) The wording that was retained has the advantage of highlighting the objective pursued by the author of the reservation, which lies at the heart of the definition of reservations adopted in the 1969 and 1986 Vienna Conventions[49] and on which the guidelines relating to the definition of interpretative declarations and other unilateral declarations formulated with regard to a treaty[50] are also based.

(25) It was pointed out, not without justification, that reservations could relate only to certain particular aspects of specific provisions, and that could constitute a third hypothesis to be added to reservations that purport "to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization", a hypothesis directly covered by paragraph 1, and those that purport "to exclude or modify the legal effect of specific aspects of the treaty as a whole", *i.e.* the across-the-board reservations which are the subject of paragraph 2. It cannot be denied that the authors of reservations frequently purport to exclude or modify the legal effect of certain provisions of a treaty only with respect to certain specific aspects,[51] but this possibility is covered by the general definition of paragraph 1 and, more specifically, by the word "modify", which necessarily implies that the reservation relates only to certain aspects of the provisions in question.

(26) Given that the definition used in the Guide to Practice is, from the outset, the one that stems from the Vienna Conventions, the commentary to article 2, paragraph (1) (d), of the Commission's draft article, which was reproduced in the Vienna Convention, retains all its relevance:

> "The need for this definition arises from the fact that States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted."[52]

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[49] See also Daniel Müller, Commentaire de l'article 21 (1969) in O. Corten and P. Klein (eds.), *Les conventions de Vienne sur le droit des traités* ..., footnote 30 above, vol. I, p. 885, para. 2; Daniel Müller, 1969 Vienna Convention Article 21, in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties* ..., footnote 30 above vol. I, p. 539, para. 2; and Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden, Nijhoff, 2009), p. 89, para. 36.

[50] See guidelines 1.2, 1.3.1, 1.4, 1.5 and 1.5.1 to 1.5.3.

[51] See, among very numerous examples, the reservations of Canada, the United States of America, Laos, Thailand and Turkey to the Convention on the Privileges and Immunities of the United Nations (*Multilateral Treaties* ..., chap. III.1), that of Malta to the 1954 Additional Protocol to the Convention concerning Customs Facilities for Touring (*ibid.*, chap. XI.A.7) and that of the European Community to articles 6 and 7 of the 1994 Convention on Customs Treatment of Pool Containers (*ibid.*, chap. XI.A.18).

[52] *Yearbook ... 1966*, vol. II, para. (11) of the commentary to article 2, pp. 189–190.

(27) This explanation brings out clearly the function of the definitions contained in this first part of the Guide to Practice: the aim is to distinguish between reservations and other unilateral statements made with respect to a treaty (the largest group of which is that of interpretative declarations), since the two are subject to different legal regimes.

(28) One should also be aware of the limitations of an endeavour of this kind: however much care is taken to define reservations and to distinguish them from other unilateral statements which have certain elements in common with them, some degree of uncertainty inevitably remains. This is inherent in the application of any definition, which is an exercise in interpretation that depends in part upon the circumstances and context and inevitably brings into play the subjectivity of the interpreter.

1.1.1 Statements purporting to limit the obligations of their author

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty, by which its author purports to limit the obligations imposed on it by the treaty, constitutes a reservation.

Commentary

(1) There is no doubt that the expression "to modify the legal effect of certain provisions of the treaty", as contained in the "Vienna definition" used in guideline 1.1, refers to reservations which *limit* or *restrict* this effect and, at the same time, to the reserving State's obligations under the treaty "because 'restricting' is a way of 'modifying'".[53] Moreover, nearly all reservations are intended to limit the obligations which are in principle incumbent on the author under the treaty.

(2) This is in all probability why the amendments proposed during the Vienna Conference on the Law of Treaties for the addition of the words "limit" and "restrict" to the list of the legal effects intended by reservations[54] were not adopted: they would not have added anything to the final text.[55]

(3) The Commission nevertheless considers that the preparation of a guide to practice does not impose the same constraints as the drafting of a convention: such a guide can contain a statement of the obvious that would not belong in a treaty.

(4) However, guideline 1.1.1 also serves a more substantial purpose. In the Commission's view, its inclusion in the Guide to Practice, together with guideline 1.1.2, helps to shed light on a question that arises constantly in connection with reservations to treaties, *i.e.* whether there is any such thing as "extensive reservations", of which there is no generally accepted definition,[56] as may be noted from the outset.

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[53] F. Horn, footnote 25 above, p. 80.

[54] See the amendments proposed by Sweden (add [a comma and] the word "limit" after the word "exclude") and Viet Nam (add a comma and the words "to restrict" after the word "exclude") (Report of the Committee of the Whole on its work at the first session of the Conference, para. 35; A/CONF.39/14, in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference*, A/CONF.39/11/Add.2 (United Nations, New York, 1971, Sales No. E.70.V.5), p. 112.

[55] See F. Horn, footnote 25 above, p. 80.

[56] For example, Ruda defines "extensive reservations" as "declarations or statements purporting to enlarge the obligations included in the treaty" and he includes "unilateral declarations whereby

(5) The Commission does not intend to enter into a purely theoretical debate, which would be out of place in a Guide to Practice, and it has refrained from using that ambiguous term, but it notes that, when a State or an international organization formulates a unilateral statement by which it intends to limit the obligations the treaty would impose on it in the absence of such a statement, its intention at the same time is inevitably to increase its own rights at the expense of those that the other contracting States or organizations would have under the treaty if the treaty was applied in its entirety; in other words, the obligations of the other contracting States and contracting organizations are increased accordingly. To this extent, "limitative" reservations — *i.e.* the majority of reservations — may appear to be "extensive reservations".

(6) A distinction should, however, be drawn between two types of statement which are related only in appearance:

- statements which, because they are designed to exempt their author from certain obligations under the treaty, restrict, by correlation, the rights of the other contracting States or organizations; and
- statements designed to impose new obligations, not provided for by the treaty, on the other parties to it.

(7) Guideline 1.1.1 relates only to statements in the first of these categories; those in the second are not reservations.[57]

(8) Certain reservations by which a State or an international organization intends to limit its obligations under the treaty have sometimes been presented as "extensive reservations". This is, for example, the case of the statement by which the German Democratic Republic indicated its intention to bear its share of the expenses of the Committee against Torture only insofar as they arose from activities within its competence as recognized by the German Democratic Republic.[58] It was questioned whether such a reservation was permissible,[59] but it is not because it would have the consequence of increasing the financial burden on the other parties that it should not be described as a reservation or that it would, by its nature, differ from the usual "modifying" reservations.

(9) This seems to apply too in the case of another example of reservations described as "extensive" on the ground that "the reserving State simply widens its rights (and not its obligations), increasing by the same token the obligations of its partners":[60] the reservations formulated by Poland and several socialist countries to article 9 of the Geneva Convention on the High Seas, under which "the rule expressed in article 9 [relating to the immunity of State

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the State assumes obligations, without receiving anything in exchange, because the negotiations for the adoption of the treaty have already been closed" ("Reservations to Treaties", *Recueil des cours de l'Académie de droit international de La Haye*, 1975-III, vol. 146, p. 107); Horn makes a distinction between "commissive declarations", by which the State making the declaration undertakes more than the treaty requires, and "extensive reservations proper", whereby "a State will strive to impose wider obligations on the other parties, assuming correspondingly wider rights for itself" (F. Horn, footnote 25 above, p. 90); Imbert considers that "there are no 'extensive reservations'" (P.-H. Imbert, footnote 25 above); see also the discussion between two members of the Commission, Mr. Bowett and Mr. Tomuschat, in 1995 (A/CN.4/SR.2401, pp. 4 and 7).

[57] See guideline 1.5 and in particular paras. (9) and (10) of the commentary thereto.

[58] See *Multilateral Treaties ...*, chap. IV.9.

[59] *Cf.* Richard W. Edwards, Jr., "Reservations to Treaties", *Michigan Journal of International Law*, 1989, pp. 392–393.

[60] R. Szafarz, footnote 27 above, pp. 295–296.

vessels] applies to all ships owned or operated by a State"[61] would constitute "extensive reservations" because the reserving State widens its rights, increasing by the same token the obligations of its partners. Once again, there is in fact nothing special about this: such a reservation "operates" like any limitative reservation; the State which formulates it modulates the rule laid down in the treaty so as to limit its treaty obligations.[62]

(10) The fact is that the reserving State must not take the opportunity offered by the treaty to try, by means of a reservation, to acquire more rights than those to which it could claim to be entitled under general international law. In such a case, a unilateral statement formulated by a State or an international organization comes not within the category of reservations, as provided for in the guideline under consideration, but under that of unilateral statements purporting to add further elements to a treaty.[63]

(11) According to the definition of reservations itself, reservations cannot be described as such unless they are made "when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or [by a State] when making a notification of succession to a treaty".[64] To the extent that unilateral statements purporting to limit the obligations of the State or the international organization formulating them are reservations, this temporal element comes into play and they are obviously subject to this temporal limitation.

(12) Taking this reasoning to its logical conclusion would probably also mean reproducing the entire list of cases in which a reservation may be formulated, as contained in guideline 1.1. However, not only is such a list incomplete,[65] but its inclusion in guideline 1.1.1 would render its wording unduly cumbersome. The Commission considered that a general reminder would be enough; this is the purpose of the expression "when that State expresses its consent to be bound".

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[61] *Multilateral Treaties* ..., chap. XXI.2.

[62] The examples of "limitative reservations" of this kind are extremely numerous, since, in this case, the modulation of the effect of the treaty may be the result of (i) the substitution by the reserving State of provisions of its internal law for provisions contained in the treaty: "The Argentine Government states that the application of article 15, paragraph 2, of the International Covenant on Civil and Political Rights shall be subject to the principle laid down in article 18 of the Argentine Constitution" ("interpretative declaration" by Argentina concerning the International Covenant on Civil and Political Rights, *Multilateral Treaties* ..., chap. IV.4); (ii) the substitution of obligations stemming from other international instruments for provisions of the treaty to which the reservation is attached: "Articles 19, 21 and 22 in conjunction with article 2, paragraph 1, of the Covenant shall be applied within the scope of article 16 of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms" (reservation No. 1 by the German Democratic Republic to the same Covenant, *ibid.*); or (iii) a different formulation, devised for the occasion by the reserving State, regardless of any pre-existing rule: "Article 14 (3) (d) of the Covenant shall be applied in such manner that it is for the court to decide whether an accused person held in custody has to appear in person at the hearing" (reservation No. 2 by the German Democratic Republic, *ibid.*).

[63] It may actually be difficult to tell the difference between the two, since everything depends on whether the State or the international organization intends, by its statement, to grant itself more rights than it has under general international law, and that depends on the interpretation both of the statement itself and of the customary rule to which the declarant is referring. Thus, in the example of the Polish statement given in para. (9) above, it must be regarded as a reservation if it is considered that there is a customary rule by virtue of which all State vessels, *lato sensu*, benefit from immunity. See also guideline 1.5 and in particular paras. (11) and (12) of the commentary thereto.

[64] See guideline 1.1.

[65] See para. (10) of the commentary to guideline 1.1.

1.1.2 Statements purporting to discharge an obligation by equivalent means

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty, by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from, but considered by the author of the statement to be equivalent to that imposed by the treaty, constitutes a reservation.

Commentary

(1) The rather specific case dealt with in guideline 1.1.2 may be illustrated by the Japanese reservation to the Food Aid Convention, 1971. Under article II of that treaty, the parties agreed to contribute as food aid to developing countries wheat and other grains in specified annual amounts. In the statement it made when signing, Japan reserved:

> "the right to discharge its obligations under article II by providing assistance in the form of rice, not excluding rice produced in non-member developing countries, or, if requested by recipient countries, in the form of agricultural materials".[66]

(2) Such a statement purports to modify the legal effect of some provisions of the treaty in their application to its author[67] and thus falls within the definition of reservations.

(3) It is quite unlikely that it would take effect without the acceptance of the other parties (at least the recipients of the assistance, in the case of the Japanese reservation), but this is the case of reservations resulting from article 20 of the 1969 and 1986 Vienna Conventions.

(4) The specificity of the reservations referred to in this guideline derives from the expression "in a manner *different from but equivalent to*". In accordance with the general principles of public international law, this equivalence can be assessed only by each contracting State or organization insofar as it is concerned. If the obligation assumed is less than that provided for by the treaty, the case is covered by guideline 1.1.2, and the unilateral declaration constitutes a reservation; if it is heavier, it is a statement purporting to undertake unilateral commitments, which is not a reservation.[68] Where assessments differ, the usual rules relating to peaceful settlement of disputes apply.

(5) The temporal element is, of course, essential in this case: if the "substitution" takes place after the entry into force of the treaty for its author, it will at best be a collateral agreement (if the other contracting States and organizations accept it) and, at worst, a violation of the treaty. However, this is true for all unilateral statements formulated "late".[69]

1.1.3 Reservations relating to the territorial application of the treaty

A unilateral statement by which a State purports to exclude the application of some provisions of a treaty, or of the treaty as a whole with respect to certain specific aspects, to a territory to which they would be applicable in the absence of such a statement constitutes a reservation.

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[66] United Nations, *Treaty Series*, vol. 800, p. 197.

[67] On the understanding that, in the above-mentioned example, things are slightly less clear, since article II does not strictly limit the grains to be supplied to wheat, although for the sake of argument it may be assumed that it does.

[68] See paras. (9) and (10) of the commentary to guideline 1.5.

[69] See also section 2.3 (Late formulation of a reservation).

Commentary

(1) As its title indicates, this guideline concerns unilateral statements by which a State[70] purports to exclude the application of certain provisions of a treaty *ratione loci*: the State consents to the application of the treaty as a whole *ratione materiae* except in respect of one or more territories to which the excluded provisions of the treaty would otherwise apply under article 29 of the Vienna Conventions.[71]

(2) In State practice it is quite common, for various reasons, to exclude or modify the application of certain provisions of a treaty in respect of a part of the territory of the State to which, in the absence of such a declaration, the provisions in question would otherwise apply.[72] The reservation formulated by the Netherlands to the International Covenant on Economic, Social and Cultural Rights is of particular interest in this regard:

> "The Kingdom of the Netherlands does not accept this provision in the case of the Netherlands Antilles with regard to the latter's central and local government bodies. [The Kingdom of the Netherlands] clarify that although it is not certain whether the reservation […] is necessary, [it] has preferred the form of a reservation to that of a declaration. In this way the Kingdom of the Netherlands wishes to ensure that the relevant obligation under the Covenant does not apply to the Kingdom as far as the Netherlands Antilles is concerned."[73]

(3) Such unilateral statements constitute reservations within the meaning of the Vienna definition: when formulated on one of the occasions specified, they purport to exclude or to modify the legal effect of certain provisions of a treaty or the treaty as a whole with respect to certain specific aspects in their application to the author of the statement. In the absence of such a statement, the treaty would apply to the State's entire territory, pursuant to the provisions of article 29 of the 1969 and 1986 Vienna Conventions. Such statements are genuine reservations because they purport the partial exclusion or modification of the treaty's application, which constitutes the very essence of a reservation.

(4) It seems self-evident that a territorial reservation must be made, at the latest, by the time the State expresses its consent to be bound by the treaty, if it purports to totally exclude the application of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects to a given territory, and on this point there is no ground on which to

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[70] For obvious reasons, this situation generally does not apply to international organizations, although cases could arise in which an organization with territorial competence might formulate a reservation of this type.

[71] Article 29 of the 1986 Vienna Convention stipulates: "Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more international organizations is binding upon each State party in respect of its entire territory."

[72] See, for example, the reservations of the United Kingdom formulated on signing the International Covenant on Economic, Social and Cultural Rights: "The Government of the United Kingdom declare that, in relation to article 8 of the Covenant, they must reserve the right not to apply sub-paragraph (b) of paragraph 1 in Hong Kong in so far as it may involve the right of trade unions not engaged in the same trade or industry to establish federations or confederations" (*Multilateral Treaties …*, chap. IV.3). See also the reservations formulated upon ratification by which the United Kingdom "reserve[s] the right to postpone the application" of various provisions of the Covenant to various territories (*ibid.*) or those formulated by the Netherlands (concerning the non-application of article 20, paragraph 1, to the Netherlands Antilles) and by the United Kingdom with regard to the International Covenant on Civil and Political Rights (*ibid.*, chap. IV.4).

[73] *Ibid.*, chap. IV.3.

differentiate the definition of territorial reservations from the general definition of reservations.

(5) While at first glance it might seem that a declaration by which a State purports to exclude the application of the treaty *as a whole* to all[74] or part of its territory could also be considered as purporting to exclude or modify the application of the legal effect of the treaty, such declarations are not necessarily[75] reservations within the meaning of guideline 1.1 but rather the expression of a "different intention" in the sense of article 29 of the Vienna Conventions. The State is not excluding the legal effect of the treaty in respect of a particular territory but is identifying "its territory", in the sense of article 29, where the treaty is applied. The legal effect of the provisions of the treaty remain intact within its territorial scope.

(6) Although in 1964 Sir Humphrey Waldock did not rule out the possibility that the intention of a State not to apply a treaty to part of its territory could be "contained in a reservation",[76] draft article 25 (which became article 29) as adopted by the Commission in 1966 refrained from qualifying such declarations of territorial application. In the commentary the Commission explained:

> "One Government proposed that a second paragraph should be added to the article providing specifically that a State, which is comprised of distinct autonomous parts, should have the right to declare to which of the constituent parts of the State a treaty is to apply. Under this proposal the declaration was not to be considered a reservation but a limitation of the consent to certain parts only of the State. The Commission was of the opinion that such a provision, however formulated, might raise as many problems as it would solve. It further considered that the words 'unless a different intention appears from the treaty or is otherwise established' in the text now proposed give the necessary flexibility to the rule to cover all legitimate requirements in regard to the application of treaties to territory."[77]

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[74] For an example of total exclusion in respect of the entire territory of a State, see the reservation of the United States of America to the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP) of 1 September 1970 (and the objections elicited by this reservation) (*Multilateral Treaties* ..., chap. XI.B.22).

[75] For example, in the case of the Convention on the Privileges and Immunities of the United Nations, adopted on 13 February 1946, and the Convention on the Privileges and Immunities of the Specialized Agencies, adopted on 21 November 1947, the position of principle of the Secretary-General in the exercise of his functions as depositary consists of considering any declaration that seeks to exclude the application of those instruments to certain territories as a "territorial reservation" and drawing them as such to the attention of the contracting States and, where appropriate, the specialized agency. This way of looking at things is justified by the fact that "in view of their nature the Conventions should be regarded as automatically applying to the Territories for the international relations of which the acceding States were responsible" (*Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, ST/LEG/8, United Nations publication, Sales No. E.94.V.15), p. 82, para. 274). The Secretary-General goes on to say: "When one State made a declaration concerning the non-application to certain of its non-metropolitan Territories of the Convention on the Privileges and immunities of the Specialized Agencies, the Secretary-General advised States parties to the Convention and the specialized agencies that the instrument had been transmitted for deposit accompanied by a territorial reservation. Since the Administrative Committee on Coordination of the specialized agencies and several States parties expressed objections, the Secretary-General did not treat the instrument as having been deposited and he invited the State that had transmitted the instrument to reconsider its reservation" (*ibid.*, para. 275).

[76] *Yearbook ... 1964*, vol. II, p. 12 (draft article 58).

[77] *Yearbook ... 1966*, vol. II, p. 213, para. (4) of the commentary.

(7) The practice of the Secretary-General likewise sheds little light on the subject of the qualification of such a declaration that purports to exclude the application of the treaty as a whole in respect of a particular territory:

> "When neither the nature of the treaty nor other special circumstances (*e.g.*, the fact that the treaty is the constitutive act of an international organization) mandate the non-acceptance of the instrument containing a declaration as to the limited application or non-application of a treaty to Territories, the Secretary-General has been guided by the general principles of resolution 598 (VI), which he has deemed to apply, *mutatis mutandis*, to 'reservations' as to the applicability to Territories. Accordingly, he has accepted instruments containing reservations as to the limited application or non-application to Territories, leaving it to the other parties to draw the legal consequences of such declaration that they may see fit."[78]

(8) It was maintained that it would be difficult to place such territorial declarations under the general legal regime of reservations and, in particular, to formulate objections to them. However, the impossibility of objecting to such a declaration would appear to derive not from its territorial nature but from its status as a reservation "authorized" by the treaty.

(9) On reflection, it would hardly seem possible to consider such declarations purporting to exclude the application of a treaty as a whole to a particular territory as actual reservations.[79] In fact, it was noted that such an assimilation would deprive a State representing a Non-Self-Governing Territory at the international level from becoming a party to a treaty prohibiting reservations for as long as the Territory was unable, for one reason or another, to undertake the same commitments.

(10) It was for this reason that the Commission decided not to include in guideline 1.1.3 cases of declarations that purport to exclude the application of a treaty as a whole to a particular territory. In principle, these are not reservations in the sense of the Vienna Convention.

1.1.4 Reservations formulated when extending the territorial application of a treaty

A unilateral statement by which a State, when extending the application of a treaty to a territory, purports to exclude or to modify the legal effect of certain provisions of the treaty in relation to that territory constitutes a reservation.

Commentary

(1) Whereas guideline 1.1.3 deals with the scope *ratione loci* of certain reservations, guideline 1.1.4 concerns the time element in the definition: the moment at which certain reservations concerning the territorial application of a treaty can be made.

(2) Generally speaking, a State makes a reservation upon signing the treaty or when it expresses its consent to be bound by it. This is in fact the only time at which a reservation can be made if that reservation purports to modify the legal effect of a provision of the treaty or of

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[78] *Summary of Practice* ..., footnote 75 above, p. 83, para. 277.

[79] In this regard, see also Syméon Karagiannis, *Commentaire de l'article 29 (1969)* in O. Corten and P. Klein, *Les Conventions de Vienne sur le droit des traités* ..., footnote 30 above, vol. II, pp. 1199–1204, paras. 19–24; and Syméon Karagiannis, 1969 Vienna Convention Article 29, in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties* ..., footnote 30 above, vol. I, pp. 737–739, paras. 19–24.

the treaty as a whole with respect to certain specific aspects.[80] That may not, however, be the case for reservations that seek to exclude or modify the legal effect of some provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to a territory not previously covered by the treaty.

(3) The territorial application of a treaty may indeed vary across time, either because a State decides to extend the application of a treaty to a territory under its jurisdiction that was not previously covered by the treaty, or because the territory came under its jurisdiction after the entry into force of the treaty, or for any other reason not covered by the provisions concerning reservations to the treaty. In such cases, the State responsible for the territory's international relations may purely and simply extend the treaty to that territory, but it may also choose to do so only partially; in the latter case, upon notifying the depositary of the extension of the territorial application of the treaty, the State also includes in the notification any new reservations specific to that territory. There is no reason to attempt to prevent it from doing so: such a restriction would make it more difficult to extend the territorial application of the treaty and is quite unnecessary provided that the unilateral statement is made in accordance with the legal regime of reservations and is therefore permissible only if it meets the conditions for validity of reservations[81] and, in particular, is compatible with the object and purpose of the treaty.

(4) By way of examples of reservations made on such occasion, one could mention the reservations made by the United Kingdom on 19 March 1962 upon extending application of the Convention Relating to the Status of Stateless Persons of 28 September 1954 to Fiji, the West Indies and Singapore[82] or the reservations made by the Netherlands in extending the Convention relating to the Status of Refugees of 28 July 1951 to Suriname on 29 July 1971.[83]

(5) There are recent examples of reservations made upon notification of territorial application: on 27 April 1993, Portugal notified the Secretary-General of the United Nations of its intention to extend to Macau the application of the two 1966 International Covenants on human rights; that notification included reservations concerning the territory.[84] On 14 October 1996, the United Kingdom notified the Secretary-General of its decision to apply the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 to Hong Kong, with a certain number of reservations.[85] Those reservations caused no reaction or objection on the part of other contracting States.

(6) It would therefore seem wise to make clear, as has in fact been suggested in the writings of legal scholars,[86] that a unilateral statement made by a State in the context of notification of territorial application constitutes a reservation if it meets the relevant conditions set out by the Vienna definition thus supplemented. This precision does not of course in any way prejudice issues related to the validity of such reservations.[87]

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[80] See paras. (9) to (14) of guideline 1.1.

[81] See Part 3 of the Guide to Practice.

[82] *Multilateral Treaties ...*, chap. V.3.

[83] *Ibid.*, chap. V.2.

[84] *Ibid.*, ..., chap. IV.3.

[85] *Ibid.*, chap. IV.8.

[86] Cf. R. Szafarz, footnote 27 above, p. 295.

[87] See also guideline 1.8, below.

1.1.5 Reservations formulated jointly

The joint formulation of a reservation by several States or international organizations does not affect the unilateral character of that reservation.

Commentary

(1) One of the fundamental characteristics of reservations is that they are unilateral statements.[88] This element of the Vienna definition is not subject to exceptions even if from a formal standpoint nothing prevents a number of States or international organizations from formulating a reservation jointly, that is to say in a single instrument addressed to the depositary of a multilateral treaty in the name of a number of parties.

(2) The practice of concerted reservations is well established: it is accepted practice for States sharing common or similar traditions, interests or ideologies to act in concert with a view to formulating identical or similar reservations to a treaty. That was often done by the Eastern European States which pledged allegiance to socialism,[89] the Nordic countries[90] and the States members of the Council of Europe or the European communities (subsequently the European Union).[91] However, each of these reservations was still formulated individually by each of the States or international organizations concerned, and this thus poses no problem in relation to the Vienna definition.

(3) Nevertheless, during the discussion of the draft which was to become article 2, paragraph 1 (d), of the Vienna Convention, one member of the Commission pointed out that a reservation could be not only concerted, but also joint in the sense that it is formulated by one or more States or international organizations in a single instrument.[92] At the time, this remark elicited no response, and in practice, it does not appear that States have to date had recourse to joint reservations.[93] The possibility of joint reservations cannot, however, be excluded. It is all the more probable in that, though there are no joint reservations, there are nowadays fairly frequent cases of:

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[88] Although in the past some authors have had a "contractual" conception of reservations (cf. Charles Rousseau, *Principes généraux de droit international public* (Paris, Pedone, 1944), vol. 1, p. 290; see also the definition proposed by James L. Brierly in 1950, *Yearbook ... 1950*, vol. II, pp. 238–239, para. 84). The adoption of the 1969 Vienna Convention silenced the controversies over this point. See also M.E. Villiger, footnote 49 above, p. 88, para. 34.

[89] See, for example, the reservations by the Byelorussian SSR, Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Mongolia, Romania and the Union of Soviet Socialist Republics to section 30 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946; some of these reservations have been withdrawn since 1989 (cf. *Multilateral Treaties ...*, chap. III.1).

[90] See, for example, the reservations of Finland and Sweden to articles 35 and 58 of the Vienna Convention on Consular Relations of 24 April 1963 (cf. *ibid.*, chap. III.6) and those of Denmark, Finland, Iceland and Sweden to article 10 of the International Covenant on Civil and Political Rights of 16 December 1966 (*ibid.*, chap. IV.4).

[91] See, for example, the reservations by Austria (No. 5), Belgium (No. 1), France (No. 6) and the Federal Republic of Germany (No. 1) to the same 1966 Covenant (*ibid.*) and the "declarations" by all the States members of the European Community made *in that capacity* to the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (*ibid.*, chap. XXVI.3).

[92] Statement by Mr. Paredes at the 651st meeting, 25 May 1962 (*Yearbook ... 1962*, vol. I, p. 163, para. 87).

[93] The reservations formulated by an international organization are attributable to the organization and not to its member States; thus they cannot be termed "joint reservations".

(a) Joint formulation of objections to reservations entered by other parties;[94]

(b) Joint formulation of interpretative declarations (which, moreover, are not always easy to distinguish from reservations *stricto sensu*).[95]

(4) That the problem may arise in the future cannot then be ruled out, and the Commission felt that it would be wise to anticipate that possibility in the Guide to Practice.

(5) The Commission felt that there could be nothing against the joint formulation of a reservation by a number of States or international organizations: it is hard to see what could prevent them from doing together what they can without any doubt do separately and in the same terms. This flexibility is all the more necessary in that, with the proliferation of common markets and of customs and economic unions, the precedents constituted by the joint objections and interpretative declarations referred to above will in all probability recur with respect to reservations, given that such institutions often share competence with their member States, and it would be highly artificial to require the latter to act separately from the institution to which they belong. Moreover, in theoretical terms such a practice would certainly not be contrary to the practice of the Vienna definition: a single act on the part of a number of States can be regarded as unilateral if its addressee or addressees are not parties to it.[96]

(6) In practical terms, such joint reservations will also possess the great advantage of simplifying the task of the depositary — which would be able to address the text of the jointly formulated reservation to the other parties without having to increase the number of notifications — and of those other parties, which could if they wished react to it by means of a single instrument.

(7) The Commission considered the advisability of going further and envisaging the possibility of collective reservations, by which a group of States or international organizations would undertake not only to formulate the reservation jointly, but also to withdraw or modify it exclusively as a group. This would also imply that the other parties would have to accept it or object to it uniformly. However, this course seemed to present more drawbacks than advantages:

- In practical terms, it would constitute an obstacle to the withdrawal of reservations, which is often considered a "necessary evil",[97] by making the withdrawal of a joint reservation contingent upon the agreement of all the States or international organizations which formulated it;

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[94] Thus, the European Community and its (then) nine member States objected, by means of a single instrument, to the "declarations" made by Bulgaria and the German Democratic Republic with respect to article 52, paragraph 3, of the Customs Convention on the International Transport of Goods under Cover of TIR Carnets of 4 November 1975, which contemplated the possibility of customs or economic unions becoming contracting parties (see *Multilateral Treaties* ..., chap. XI.A-16). See also guideline 2.6.4 (Objections formulated jointly).

[95] See the declarations made by the European Community and its member States, or by the latter alone, with respect, for example, to the United Nations Framework Convention on Climate Change of 9 May 1992 (*ibid.*, chap. XXVII.7), the Convention on Biological Diversity of 5 June 1992 (*ibid.*, chap. XXVII.8) and the Agreement of 4 August 1995 on straddling fish stocks (*ibid.*, chap. XXI.7). See also guideline 1.2.1 (Interpretative declarations formulated jointly).

[96] This is a case of what may be termed "multi-partite unilateral acts"; on this point, see the first report by Mr. V. Rodriquez-Cedeño on unilateral acts of States (A/CN.4/486, paras. 79 and 133), *Yearbook ... 1998*, vol. II, Part One, pp. 329 and 335.

[97] See the statement made by Roberto Ago at the 797th meeting of the Commission, 8 June 1965, *Yearbook ... 1965*, vol. I, p. 166.

- In theoretical terms, it would imply that a group of parties could impose upon the others the rules on reservations agreed upon by them, which is hardly compatible with the principle of the relative effect of treaties; in other words, it was possible that a number of States or international organizations might agree to consider that the reservation formulated collectively by them could only be withdrawn or modified collectively, but such an agreement would be *res inter alios acta* with regard to the other contracting States or organizations to the treaty to which the reservation related.

(8) These are the reasons for which the Commission, while envisaging the possibility of jointly formulated reservations, decided to specify that such reservations were nonetheless subject to the general regime of reservations, governed largely by their "unilateral" nature, which cannot be affected by such joint formulation.

(9) Moreover, it should be specified that the coordinating conjunction "or" used in guideline 1.1.5[98] in no way excludes the possibility of reservations formulated jointly by one or more States *and* by one or more international organizations, and should be understood to mean "and/or". Nevertheless, the Commission considered that this formulation would make the text too cumbersome.

1.1.6 Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of the treaty

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty with regard to the party that has made the statement, constitutes a reservation expressly authorized by the treaty.

Commentary

(1) According to a widely accepted definition, an exclusionary or opting-out (or contracting-out) clause is a treaty provision by which a State will be bound by rules contained in the treaty unless it expresses its intent not to be bound, within a certain period of time, by some of those provisions.[99]

(2) Such exclusionary clauses (opting or contracting out clauses) are quite common. Examples can be found in the conventions adopted under the auspices of The Hague Conference on Private International Law,[100] the Council of Europe,[101] the International

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[98] "... by several States *or* international organizations ...".

[99] Cf. Bruno Simma, "From Bilateralism to Community Interest in International Law", *Recueil des cours* ..., 1994-VI, vol. 250, p. 329; see also Christian Tomuschat, "Obligations Arising for States Without or Against Their Will", *Recueil des cours* ..., 1993, vol. 241, pp. 264 ff.

[100] Cf. article 8, first subparagraph, of the Convention of 15 June 1955 relating to the settlement of conflicts between the law of nationality and the law of domicile: "Each Contracting State, when signing or ratifying the present Convention or acceding thereto, may declare that it excludes the application of this Convention to disputes between laws relating to certain matters"; see also article 9 of The Hague Convention of 1 June 1956 concerning the recognition of the legal personality of foreign companies, associations and foundations.

[101] Cf. article 34, paragraph 1, of the European Convention for the peaceful settlement of disputes of 29 April 1957: "On depositing its instrument of ratification, any one of the High Contracting Parties may declare that it will not be bound by: (a) Chapter III relating to arbitration; or (b) Chapters II and III relating to conciliation and arbitration"; see also article 7, paragraph 1, of the Council of Europe Convention on reduction of cases of multiple nationality and military

Labour Organization[102] and in various other conventions. Among the latter, one may cite by way of example article 14, paragraph 1, of the London Convention of 2 November 1973 for the Prevention of Pollution from Ships:

> "A State may, at the time of signing, ratifying, accepting, approving or acceding to the present Convention, declare that it does not accept any one or all of Annexes III, IV and V (hereinafter referred to as 'Optional Annexes') of the present Convention. Subject to the above, Parties to the Convention shall be bound by any Annex in its entirety."[103]

(3) The question whether or not statements made in application of such exclusionary clauses are reservations is controversial. The strongest argument that they are not reservations derives no doubt from the consistent strong opposition of the ILO to such an assimilation, even though that organization regularly resorts to the opting-out procedure.[104] In its reply to the Commission's questionnaire, the ILO wrote:

> "It has been the consistent and long-established practice of the ILO not to accept for registration instruments of ratification of international labour Conventions when accompanied with reservations. As has been written, 'this basic proposition of refusing to recognize any reservations is as old as ILO itself' (see W.P. Gormley, 'The Modification of Multilateral Conventions by Means of Negotiated Reservations and Other Alternatives: A Comparative Study of the ILO and Council of Europe', *Fordham Law Review*, 1970, p. 65). The practice is not based on any explicit legal provision of the Constitution, the Conference Standing Orders, or the international labour Conventions, but finds its logical foundation in the specificity of labour Conventions and the tripartite structure of the Organization. Reference is usually made to two Memoranda as being the primary sources for such firm principle: first, the 1927 Memorandum submitted by the ILO Director to the Council of the League of Nations on the Admissibility of Reservations to General Conventions, and second, the 1951 Written Statement of the International Labour Organization in the context of the ICJ proceedings concerning the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.

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obligations in cases of multiple nationality of 6 May 1963: ("Each Contracting Party shall apply the provisions of Chapters I and II. It is however understood that each Contracting Party may declare, at the time of ratification, acceptance or accession, that it will apply the provisions of Chapter II only. In this case the provisions of Chapter I shall not be applicable in relation to that Party"); and article 25, first subparagraph, of the European Convention on Nationality of 6 November 1997: ("Each State may declare, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, that it will exclude Chapter VII from the application of this Convention"), etc. For other examples, see Sia Spiliopoulou Åkermark, "Reservation Clauses in Treaties Concluded within the Council of Europe", *ICLQ*, 1999, pp. 504–505.

[102] Cf. article 2 of International Labour Convention No. 63 of 1938, concerning statistics of wages and hours of work: "1. Any Member which ratifies this Convention may, by a declaration appended to its ratification, exclude from its acceptance of the Convention: (a) any one of Parts II, III or IV; or (b) Parts II and IV; or (c) Parts III and IV."

[103] The provisions which follow are cited by way of example and in no way exhaust the list of exclusionary clauses of conventions adopted in these forums. For other examples, see, in general, P.-H. Imbert, footnote 25 above, pp. 171–172.

[104] See also Guido Raimondi, "Réserves et conventions internationales du travail", in J.-C. Javillier and B. Gernigon, Les normes internationales du travail: un patrimoine pour l'avenir, *Mélanges en l'honneur de Nicolas Valticos*, International Labour Office, Geneva, 2004, pp. 527–539.

"In his Memorandum to the Committee of Experts for the Codification of International Law, the ILO Director-General wrote with respect to labour Conventions:

> 'these agreements are not drawn up by the Contracting States in accordance with their own ideas: they are not the work of plenipotentiaries, but of a conference which has a peculiar legal character and includes non-government representatives. Reservations would still be inadmissible, even if all the States interested accepted them; for the rights which the treaties have conferred on non-governmental interests in regard to the adoption of international labour Conventions would be overruled if the consent of the Governments alone could suffice to modify the substance and detract from the effect of the Conventions' (see League of Nations, *Official Journal*, 1927, at p. [882]).

"In the same vein, the ILO Memorandum, submitted to the ICJ in 1951, read in part:

> 'international labour conventions are adopted and enter into force by a procedure which differs in important respects from the procedure applicable to other international instruments. The special features of this procedure have always been regarded as making international labour conventions intrinsically incapable of being ratified subject to any reservation. It has been the consistent view of the International Labour Organization, since its establishment, that reservations are not admissible. This view is based upon and supported by the consistent practice of the International Labour Organization and by the practice of the League of Nations during the period from 1920–1946 when the League was responsible for the registration of ratifications of international labour conventions' (see *I.C.J. Pleadings, 1951*, at pp. 217, 227–228).

"Wilfred Jenks, Legal Adviser of the ILO, addressing in 1968 the United Nations Vienna Conference on the Law of Treaties, stated the following:

> 'reservations to international labour Conventions are incompatible with the object and purpose of these Conventions. The procedural arrangements concerning reservations are entirely inapplicable to the ILO by reason of its tripartite character as an organization in which, in the language of our Constitution, "representatives of employers and workers" enjoy "equal status with those of governments". Great flexibility is of course necessary in the application of certain international labour Conventions to widely varying circumstances, but the provisions regarded by the collective judgement of the International Labour Conference as wise and necessary for this purpose are embodied in the terms of the Conventions and, if they prove inadequate for the purpose, are subject to revision by the Conference at any time in accordance with its regular procedures. Any other approach would destroy the international labour code as a code of common standards'.

"In brief, with relation to international labour Conventions, a member State of the ILO must choose between ratifying without reservations and not ratifying. Consistent with this practice, the Office has on several occasions declined proffered ratifications which would have been subject to reservations (for instance, in the 1920s, the Governments of Poland, India and Cuba were advised that contemplated ratifications subject to reservations were not permissible; see *Official Bulletin*, vol. II, p. 18, and vol. IV, pp. 290–297). Similarly, the Organization refused recognition of reservations proposed by Peru in 1936. In more recent years, the Office refused to register the ratification of Convention No. 151 by Belize as containing two true reservations (1989). In each instance, the reservation was either withdrawn or the State was unable to ratify the Convention.

"It is interesting to note that, in the early years of the Organization, the view was taken that ratification of a labour Convention might well be made subject to the specific condition that it would only become operative if and when certain other States would have also ratified the same Convention (see International Labour Conference, 3rd session, 1921, at p. 220). In the words of the ILO Director-General in his 1927 Memorandum to the Council of the League of Nations,

> 'these ratifications do not really contain any reservation, but merely a condition which suspends their effect; when they do come into force, their effect is quite normal and unrestricted. Such conditional ratifications are valid, and must not be confused with ratifications subject to reservation which modify the actual substance of conventions adopted by the International Labour Conference' (for examples of ratifications subject to suspensive conditions, see Written Statement of the ILO in *Genocide Case*, *I.C.J. Pleadings, 1951*, at pp. 264–265).

There is no record of recent examples of such a practice. In principle, all instruments of ratification take effect 12 months after they have been registered by the Director-General.

"Notwithstanding the prohibition of formulating reservations, ILO member States are entitled, and, at times, even required, to attach declarations – optional and compulsory accordingly. A compulsory declaration may define the scope of the obligations accepted or give other essential specifications. In some other cases a declaration is needed only where the ratifying State wishes to make use of permitted exclusions, exceptions or modifications. In sum, compulsory and optional declarations relate to limitations *authorized* by the Convention itself, and thus do not amount to reservations in the legal sense. As the Written Statement of the ILO in the *Genocide Case* read, 'they are therefore a part of the terms of the convention as approved by the Conference when adopting the convention and both from a legal and from a practical point of view are in no way comparable to reservations' (see *I.C.J. Pleadings, 1951*, at p. 234). Yet for some, these flexibility devices have 'for all practical purposes the same operational effect as reservations' (see Gormley, *op. cit., supra*, at p. 75)."[105]

(4) While this reasoning reflects a respectable tradition, it is somewhat less than convincing:

- in the first place, while international labour conventions are obviously adopted under very specific circumstances, they are nevertheless treaties between States, and the participation of non-governmental representatives in their adoption does not modify their legal nature;
- secondly, the possibility that the International Labour Conference might revise a convention that proved to be inadequate proves nothing about the legal nature of unilateral statements made in application of an exclusionary clause: the revised convention could not be imposed against their will on States that had made such statements when becoming parties to the original convention, and it matters little in such cases whether or not those statements were reservations;

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[105] Reply to the questionnaire, pp. 3–5.

- lastly, and most importantly, the position traditionally taken by ILO reflects a restrictive view of the concept of reservations which is not reflected in the Vienna Conventions nor in the present Guide to Practice.

(5) In fact, the Vienna Conventions do not exclude that reservations may be made, not by virtue of an authorization implicit in the general international law of treaties, as codified in articles 19 to 23 of the 1969 and 1986 Conventions, but on the basis of specific treaty provisions. This is clear from article 19 (b) of the Conventions, which concerns treaties that provide "that only *specified* reservations … may be made", or article 20, paragraph 1, which stipulates that "a reservation *expressly authorized* by a treaty does not require any subsequent acceptance …".

(6) The fact that a unilateral statement purporting to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author[106] is specifically provided for by a treaty is not sufficient to characterize such a statement as either being or not being a reservation. This is precisely the object of "reservation clauses" that can be defined as "treaty provisions [… setting] limits within which States should [[107]] formulate reservations and even the content of such reservations".[108]

(7) In fact, exclusionary clauses are clearly related to reservation clauses, and the resulting unilateral statements are related to the "specified" reservations "expressly authorized" by a treaty, including international labour conventions.[109] They are indeed unilateral statements made at the time consent to be bound[110] is expressed and purporting to exclude the legal effect of certain provisions of the treaty as they apply to the State or the international organization making the statement, all of which corresponds exactly to the definition of reservations, and, at first glance at least, it would seem that they are not and need not be subject to a separate legal regime.

(8) Except for the absence of the word "reservations", there appears to be little difference between the aforementioned exclusionary clauses[111] and what are indisputably reservation clauses, such as article 16 of the Hague Convention of 14 March 1970, on celebration and recognition of the validity of marriages;[112] article 33 of the Convention concluded on 18 March 1978 in the context of the Hague Conference on Private International Law, on the taking of evidence abroad in civil or commercial matters;[113] and article 35, entitled

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[106] Cf. guideline 1.1.

[107] It would be more accurate to use the word "may".

[108] P.-H. Imbert, footnote 25 above, p. 12.

[109] At the same time, there is little doubt that a practice accepted as law has developed in the ILO. Under this practice, any unilateral statement seeking to limit the application of the provisions of international labour conventions that is not explicitly stipulated is inadmissible. This is also clearly the case with regard to the conventions adopted by The Hague Conference of Private International Law (see Georges A.L. Droz, "Les réserves et les facultés dans les Conventions de La Haye de droit international privé", *RCDIP 1969*, pp. 388–392). However, this is an altogether different question from that of defining reservations.

[110] With regard to statements made in application of an exclusionary clause but subsequent to its author's expression of consent to be bound, see para. (17) of the commentary below.

[111] See para. (2) of the commentary.

[112] "A Contracting State may reserve the right to exclude the application of Chapter I" (article 28 provides for the possibility of "reservations").

[113] "A State may, at the time of signature, ratification or accession, exclude, in whole or in part, the application of the provisions of paragraph 2 of article 4 and of Chapter II. No other reservation shall be permitted."

"Reservations", of the Lugano Convention of the Council of Europe of 21 June 1993, on civil liability for damages resulting from activities dangerous to the environment.[114] It is thus apparent that, in both their form and their effects,[115] statements made by virtue of exclusionary clauses when expressing consent to be bound are in all respects comparable to reservations when provision is made for the latter, with restrictions, by reservation clauses.[116]

(9) The fact that a State party cannot formulate an objection to a statement made under such an exclusionary clause does not rule out the classification of such a statement as a reservation. However, this is no doubt true of every reservation formulated under a reservation clause: once a reservation is expressly authorized by a treaty, the contracting States and organizations know what to expect; they have accepted in advance the reservation or reservations concerned in the treaty itself. This is not in fact a problem of definition, but one of legal regime.[117]

(10) In reality, exclusionary clauses take the form of "negotiated reservations", as the term is currently (and erroneously) accepted in the context of the Hague Conference on Private International Law and further developed in the context of the Council of Europe.[118] "Strictly speaking, this means that it is the *reservation* — and not only the right to make one — that is the subject of the negotiations."[119] These, then, are not "reservations" at all in the proper sense of the term, but *reservation clauses* that impose limits and are precisely defined when the treaty is negotiated.

(11) It is true that, in some conventions (at least those of the Council of Europe), exclusionary *and* reservation clauses are present at the same time.[120] This is probably more a reflection of terminological vagueness than a deliberate distinction.[121] Moreover, it is striking that, in its reply to the Commission's questionnaire, the ILO should mention among the problems encountered in the areas of reservations those relating to article 34 of the European

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[114] "Any signatory may declare, at the time of signature or when depositing its instrument of ratification, acceptance or approval, that it reserves the right: … '(c) not to apply article 18'."

[115] See W. Paul Gormley, "The Modification of Multilateral Conventions by Means of 'Negotiated Reservations' and Other 'Alternatives': A Comparative Study of the ILO and Council of Europe", Part I, *Fordham Law Review*, 1970–1971, pp. 75–76.

[116] See P.-H. Imbert, footnote 25 above, p. 169, and S. Spiliopoulou Åkermark, footnote 101 above, pp. 505–506.

[117] See also guideline 4.1.1 (Establishment of a reservation expressly authorized by a treaty).

[118] See G.A.L. Droz, footnote 109 above, pp. 385–388; Héribert Golsong, "Le développement du droit international régional" in *SFDI*, Colloque de Bordeaux, *Régionalisme et universalisme dans le droit international contemporain*, 1997, p. 228, and S. Spiliopoulou Åkermark, footnote 101 above, pp. 489–490.

[119] P.-H. Imbert, footnote 25 above, p. 196. The term is used in the Council of Europe in a broader sense, seeking to cover the "*procedure* intended to enumerate either in the body of the Convention itself or in an annex the limits of the options available to States in formulating a reservation" (H. Golsong, footnote 118 above, p. 228 (emphasis added); see also S. Spiliopoulou Åkermark, footnote 101 above, p. 498; see also pp. 489–490).

[120] See articles 7 (footnote 101 above) and 8 of the Council of Europe Convention of 1968 on reduction of cases of multiple nationality, and the examples given by S. Spiliopoulou Åkermark, footnote 101 above, p. 506, note 121.

[121] Likewise, the fact that certain multilateral conventions prohibit any reservations while allowing some statements that may be equated with exclusionary clauses (see article 124 of the Statute of the International Criminal Court of 17 July 1998) is not in itself decisive; it, too, is doubtless more the result of terminological vagueness than of an intentional choice aimed at achieving specific legal effects.

Convention for the peaceful settlement of disputes, since the word "reservation" does not even appear in this standard exclusionary clause.[122]

(12) The case covered in guideline 1.1.6 is the same as that dealt with in article 17, paragraph 1, of the 1969 and 1978 Vienna Conventions:

> "Without prejudice to articles 19 to 23, the consent of a State [or of an international organization] to be bound by part of a treaty is effective only if the treaty so permits …".

(13) This provision, which was adopted without change by the 1968–1969 Vienna Conference,[123] is contained in part II, section 1, of the Convention (Conclusion of treaties) and creates a link with articles 19 to 23 dealing specifically with reservations. It is explained by the Commission as follows in its final report of 1966 on the draft articles on the law of treaties:

> "Some treaties expressly authorize States to consent to a part or parts only of the treaty or to exclude certain parts, and then, of course, partial ratification, acceptance, approval or accession is admissible. But in the absence of such a provision, the established rule is that the ratification, accession etc. must relate to the treaty as a whole. Although it may be admissible to formulate reservations to selected provisions of the treaty under the rule stated in article 16 [19 in the text of the Convention], it is inadmissible to subscribe only to selected parts of the treaty. Accordingly, paragraph 1 of the article lays down that, without prejudice to the provisions of articles 16 to 20 [19 to 23] regarding reservations to multilateral treaties, an expression of consent by a State to be bound by part of a treaty is effective only if the treaty or the other contracting States authorize such a partial consent."[124]

(14) The expression "without prejudice to articles 19 to 23" in article 17 of the 1969 and 1986 Vienna Conventions implies that, in some cases, options amount to reservations.[125] Conversely, it would appear that this provision is drafted so as not to imply that all clauses that offer parties a choice between various provisions of a treaty *are* reservation clauses.

(15) This is certainly true of statements made under an optional clause, as indicated in guideline 1.5.3. However, one might ask whether it is not also true of certain statements made under certain exclusionary clauses, which, while having the same or similar effects as reservations, are not reservations in the strict sense of the term, as defined in the Vienna Conventions and the Guide to Practice.

(16) It so happens that some treaties allow the parties to exclude, by means of a unilateral statement, the legal effect of certain of the treaty's provisions in their application to the author of the statement, not (or not only) at the time of expression of consent to be bound, but after the treaty enters into force for them. For example:

- Article 82 of the International Labour Convention on minimum standards authorizes a member State that has ratified the Convention to denounce, ten years after the entry into force of the Convention, either the entire Convention or one or more of Parts II to X;

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[122] See footnote 101 above.

[123] See *Documents of the Conference*, A/CONF.39/11/Add.2, footnote 54 above, Reports of the Committee of the Whole, paras. 156–157, pp. 129–130.

[124] *Yearbook … 1966*, vol. II, pp. 219–220.

[125] See S. Spiliopoulou Åkermark, footnote 101 above, p. 506.

- Article 22 of the Hague Convention of 1 June 1970 on the recognition of divorces and legal separations authorizes contracting States, "*from time to time*, [to] declare that certain categories of persons having their nationality need not be considered their nationals for the purposes of this Convention";[126]

- Article 30 of the Hague Convention of 1 August 1989 on The Law Applicable to succession to the Estate of Deceased Persons stipulates that:

  > "A State Party to this Convention may denounce it, *or only Chapter III of the Convention*, by a notification in writing addressed to the depositary";

- Article X of the ASEAN Framework Agreement on Services of 4 July 1996 authorizes a member State to modify or withdraw any commitment in its schedule of specific commitments, subject to certain conditions, at any time after three years from the date on which that commitment entered into force.

(17) Unilateral statements made under provisions of this type are certainly not reservations.[127] In this respect, the fact that they are formulated (or may be formulated) at a time other than the time of consent to be bound is perhaps not in itself absolutely decisive insofar as nothing prevents negotiators from departing from the provisions of the Vienna Conventions, which are merely residual in nature. Nevertheless, statements made under these exclusionary clauses after the entry into force of the treaty are very different from reservations in that they do not place conditions on the accession of the State or the international organization which makes them. Reservations are an element of the conclusion and entry into force of a treaty, as is demonstrated by the inclusion of articles 19 to 23 of the Vienna Conventions in Part II of those instruments, entitled "Conclusion and entry into force of treaties". They are partial acceptances of the provisions of the treaty to which they relate, and that is why it seems logical to consider statements made at the time of expressing consent to be bound as being reservations. On the other hand, statements made after the treaty has been in force for a certain period of time in respect of their author are partial denunciations which, in their spirit, are much more closely related to Part V of the Vienna Conventions concerning invalidity, termination and suspension of the operation of treaties. They may also be linked to article 44, paragraph 1, which does not exclude the right of a party to withdraw partially from a treaty if the treaty so provides.

(18) Such statements are expressly excluded from the scope of guideline 1.1.6 by the words "when that State or organization expresses its consent to be bound".

1.2 Definition of interpretative declarations

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.

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[126] Concerning the circumstances under which this provision was adopted, see G.A.L. Droz, footnote 109 above, pp. 414–415. This, typically, is a "negotiated reservation" in the sense referred to in para. (11) of the commentary.

[127] Significantly, article 22, already cited, of the Convention on the recognition of divorces and legal separations, of the 1970 Hague Conference, is omitted from the list of reservation clauses given in article 25.

Commentary

(1) Notwithstanding the silence of the 1969 and 1986 Vienna Conventions on this phenomenon, States have always felt that they could attach to their expression of consent to be bound by a multilateral treaty declarations whereby they indicate the spirit in which they agree to be bound; such declarations do not, however, seek to modify or exclude the legal effect of certain provisions of the treaty (or of the treaty as a whole with respect to certain specific aspects) and thus do not constitute reservations, but interpretative declarations.[128]

(2) It is often difficult to distinguish between such unilateral declarations and, on the one hand, reservations as defined in guideline 1.1 and, on the other hand, other types of unilateral declarations which are made in respect of a treaty, but which are neither reservations nor interpretative declarations and examples of which are provided in section 1.5 of the present Guide to Practice. This distinction is of great practical importance, however, because it affects the legal regime applicable to each of these declarations.

(3) For a long time, reservations and interpretative declarations were not clearly distinguished in State practice or in writings. In the writings, the dominant view simply grouped them together, and authors who made a distinction generally found themselves embarrassed by it.[129]

(4) A number of elements help to blur the necessary distinction between reservations and interpretative declarations:

- the terminology is not used consistently;
- the practice of States and international organizations is uncertain; and
- the declarants' objectives are not always unambiguous.

(5) The terminological uncertainty is underscored by the definition of reservations itself, since, according to the 1969, 1978 and 1986 Vienna Conventions, a reservation is "a unilateral statement, *however phrased or named* ...".[130] This "negative precision" eschews any nominalism and focuses instead on the actual content of declarations and on the effect they seek to produce, but — and here is the reverse side of the coin — this decision to give precedence to substance over form runs the risk, at best, of encouraging States not to pay attention to the name they give to their declarations, thereby sowing confusion or unfortunate

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[128] The long-standing practice of such declarations had been in existence since multilateral treaties themselves first appeared. Generally speaking, it dates back to the Final Act of the Congress of Vienna in 1815, which brought together "in a general instrument" all treaties concluded in the wake of Napoleon's defeat. With this initial appearance of the multilateral format came both a reservation and an interpretative declaration. The latter came from Great Britain, which, when the instruments of ratification were exchanged, declared that article VIII of the Treaty of Alliance concluded with Austria, Prussia and Russia, which invited France to join the Alliance, must be "understood as binding the Contracting Parties ... to a common effort against the power of Napoleon Bonaparte ..., but is not to be understood as binding His Britannic Majesty to prosecute the War, with a view of imposing upon France any particular Government". Today, interpretative declarations are very frequent, as shown by the replies of States and, to a lesser extent, of international organizations to the Commission's questionnaire on reservations.

[129] See the survey of writings prior to 1969 made by F. Horn, footnote 25 above, p. 229; see also Donald M. McRae, "The Legal Effect of Interpretative Declarations", *B.Y.B.I.L.* 1978, p. 156; Rosario Sapienza, *Dichiarazioni interpretative unilaterali e trattati internazionali* (Milan, Giuffrè, 1996), pp. 69–82 (prior to the Second World War) and pp. 117–122 (post-1945), or Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984), pp. 52–53.

[130] Article 2, para. 1 (d), of the 1969 Convention and article 2, para. 1 (j), of the 1986 Convention.

ambiguity; at worst, it allows them to play with names in order to create uncertainty as to the real nature of their intentions.[131] By giving the name "declarations" to instruments that are unquestionably genuine reservations, they hope not to arouse the vigilance of the other States parties while attaining the same objectives; conversely, to give greater weight to declarations that clearly have no legal effect on the provisions of a treaty, they label them "reservations", even though under the terms of the Vienna definition they are not.

(6) Instruments having the same objective can be called "reservations" by one party and "interpretative declarations" by another.[132] Sometimes, instruments having the same objective can be called "reservations" by some States, "interpretations" by others and nothing at all by still others.[133] In some cases, a State will employ various expressions that make it difficult to tell whether they are being used to formulate reservations or interpretative declarations and whether they have different meanings or scope.[134] Thus, the same words can, in the view of the very State employing them, cover a range of legal meanings.[135] It sometimes happens that, faced with an instrument entitled "declaration", the other contracting States and organizations view it in different ways and treat it either as such or as a "reservation" or that, conversely, objections to a "reservation" refer to it as a "declaration";[136] and, at the limit of this terminological confusion, there are even occasions when States make interpretative

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[131] As Denmark points out in its reply to the Commission's questionnaire on reservations: "There even seems to be a tendency among States to cast their reservations in terms of interpretative statements either because the treaty does not allow for reservations proper or because it looks 'nicer' with an interpretative declaration than a real reservation."

[132] For example, France and Monaco have used identical terms to spell out the way in which they interpret article 4 of the 1966 Convention on the Elimination of All Forms of Racial Discrimination, yet Monaco submitted this interpretation as a reservation while France formally announced that its intention was merely to "place on record its interpretation" of that provision (*Multilateral Treaties* ..., chap. IV.2). Poland and the Syrian Arab Republic declared in the same terms that they did not consider themselves bound by the provisions of article 13, paragraph 1, of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, but the former expressly called this statement a "reservation", while the latter labelled it a "declaration" (*ibid.*, chap. XVIII.7).

[133] See in this connection the comments by F. Horn, footnote 25 above, p. 294, on the subject of declarations made in respect of the 1966 International Covenant on Civil and Political Rights.

[134] That was the case of France, for example, when it acceded to the International Covenant on Civil and Political Rights:

> "The Government of the Republic considers that ...";
>
> "The Government of the Republic enters a reservation concerning ...";
>
> "The Government of the Republic declares that ...";
>
> "The Government of the Republic interprets ...";

with all of these formulas appearing under the heading "Declarations and reservations" (example given by R. Sapienza, footnote 129 above, pp. 154–155; complete text in *Multilateral Treaties* ..., chap. IV.4).

[135] In accepting the IMCO Statute, Cambodia twice used the word "declares" to explain the scope of its acceptance. In response to a request for clarification from the United Kingdom, Norway and Greece, Cambodia explained that the first part of its declaration was "a political declaration" but that the second part was a reservation (*ibid.*, chap. XII.1).

[136] For example, while several of the "Eastern bloc" countries identified their statements of opposition to article 11 of the Vienna Convention on Diplomatic Relations (which deals with size of missions) as "reservations", the countries that objected to those statements sometimes called them "reservations" (Federal Republic of Germany and the United Republic of Tanzania) and sometimes "declarations" or "statements" (Australia, Belgium, Canada, Denmark, France, the Netherlands, New Zealand, Thailand and the United Kingdom) (*ibid.*, chap. III.3).

declarations by means of a specific reference to the provisions of a convention on reservations.[137]

(7) The confusion is made worse by the fact that, while in French one encounters few terms other than "*réserves*" and "*déclarations*",[138] English terminology is much more varied, since certain English-speaking States, particularly the United States of America, use not only "reservation" and "(interpretative) declaration", but also "statement", "understanding", "proviso", "interpretation", "explanation" and so forth. The advantage of this variety of terms, although not based on strict distinctions,[139] is that it shows that all unilateral declarations formulated in respect of or on the occasion of a treaty are not necessarily either reservations or interpretative declarations; guidelines at 1.5 to 1.5.3 describe some of these other types of unilateral declarations, which, in the view of the Commission, are neither reservations nor interpretative declarations as understood in the Guide to Practice.

(8) It goes without saying that the elements listed above are not in themselves likely to facilitate the search for an independent criterion for distinguishing between reservations and interpretative declarations. It should be possible to seek it empirically, however, by starting, as is generally done,[140] with the definition of reservations in order to extract, by means of comparison, the definition of interpretative declarations. At the same time, this also makes it possible to distinguish both interpretative declarations and reservations from other unilateral declarations that fall into neither of these categories.

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[137] Such was the case of a "declaration" made by Malta with regard to article 10 of the European Convention on Human Rights which referred to former article 64 (now article 57) of that instrument (example cited by William Schabas, Commentary on article 64, in Louis-Edmond Pettiti, Emmanuel Decaux and Pierre-Henri Imbert (dirs.), *La Convention européenne des droits de l'homme – Commentaire article par article* (Paris, Economica, 1995), p. 926).

[138] This would seem to hold true in general for all the romance languages: in Spanish, the distinction is made between "*reserva*" and "*declaración (interpretativa)*", in Italian between "*riserva*" and "*dichiarazione (interpretativa)*", in Portuguese between "*reserva*" and "*declaração (interpretativa)*" and in Romanian between "*rezervă*" and "*declarație (interpretativ)*". The same holds true for Arabic, German and Greek.

[139] Marjorie M. Whiteman describes United States practice this way: "The term 'understanding' is often used to designate a statement when it is not intended to modify or limit any of the provisions of the treaty in its international operation but is intended merely to clarify or explain or to deal with some matter incidental to the operation of the treaty in a manner other than a substantive reservation ... The terms 'declaration' and 'statement' are used most often when it is considered essential or desirable to give matters of policy or principle, without an intention of derogating from the substantive rights or obligations stipulated in the treaty." (Footnote 25 above, pp. 137–138); see also the letter dated 27 May 1980 from Mr. Arthur W. Rovine, Assistant Legal Adviser for Treaties in the United States Department of State, to Mr. Ronald F. Stowe, Chairman of the Air and Space Law Committee of the International Law Section of the American Bar Association, reproduced in Marian Nash Leich, ed., *Digest of United States Practice in International Law* (Washington, D.C., Office of the Legal Adviser, Department of State, 1980), pp. 397–398. These various names can have a legal impact on some domestic legislation; they seem not to in the area of international law, and it is not certain that the distinctions are categorical, even at the internal level. Thus during the debate in the United States Senate on the Convention relating to the Organization for Economic Cooperation and Development (OECD), when the Chairman of the Foreign Affairs Committee asked what the difference between a "declaration" and an "understanding" was, the Under-Secretary of State for Economic Affairs replied: "Actually the difference between a declaration and an understanding, I think, is very subtle, and I am not sure that it amounts to anything" (quoted by Marjorie M. Whiteman, *op. cit.*, p. 192). In Chinese, Russian and the Slavic languages in general, it is possible to draw distinctions between several types of "interpretative" declarations.

[140] Cf. R. Sapienza, footnote 129 above, p. 142 or F. Horn, footnote 25 above, p. 236.

(9) That was the position of Fitzmaurice, third Special Rapporteur on the Law of Treaties, who, in his first report in 1956, defined interpretative declarations negatively in contrast with reservations, stating that the term "reservation":

> "does not include mere statements as to how the State concerned proposes to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty".[141]

However, that was a "negative", "hollow" definition, which clearly showed that reservations and interpretative declarations were distinct legal instruments but did not positively define what was meant by "interpretative declaration". Furthermore, the formulation ultimately used, which, it may be assumed, probably related to the "conditional interpretative declarations" defined in guideline 1.4, was lacking in precision, to say the least.

(10) This second shortcoming was corrected in part by Waldock, fourth Special Rapporteur on the Law of Treaties, who, in his first report, submitted in 1962, removed some of the ambiguity brought about by the last part of the definition proposed by his predecessor, but once again proposed a purely negative definition:

> "an explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation".[142]

(11) In the view of the Commission, this procedure makes it possible to know what an interpretative declaration is not; it is of little use in defining what it is, a question in which the International Law Commission lost interest during the drafting of the Vienna Convention.[143] Yet it is important to determine "positively" whether or not a unilateral declaration made in respect of a treaty constitutes an interpretative declaration because it gives rise to specific legal consequences which are described in Part 4 of the Guide to Practice.

(12) An empirical observation of practice helps to determine in a reasonably precise manner how interpretative declarations are similar to reservations and how they differ, and to arrive at a positive definition of the former.

(13) There seems to be little point in dwelling on the fact that an interpretative declaration is most certainly a unilateral declaration[144] in the same way as a

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[141] Document A/CN.4/101; *Yearbook ... 1956*, vol. II, p. 112.

[142] Document A/CN.4/144; *Yearbook ... 1962*, vol. II, p. 36.

[143] However, the commentary to draft article 2, paragraph 1 (d), points out that the declaration which is a mere "clarification of the State's position" ... does not "amount to a reservation" (*Yearbook ... 1966*, vol. II, p. 206). Moreover, in its comments on the draft articles on the law of treaties adopted on first reading, Japan attempted to bridge that gap by noting "that not infrequently a difficulty arises in practice of determining whether a statement is in the nature of a reservation or of an interpretative declaration" and by suggesting that "a new provision should be inserted [...] in order to overcome this difficulty" (Sir Humphrey Waldock, fourth report on the law of treaties, *Yearbook ... 1964*, vol. II, pp. 46–47). However, the Japanese position confined itself to making provision for the addition of a paragraph to draft article 18 (which became article 19): "2. A reservation, in order to qualify as such under the provisions of the present articles, must be formulated in writing, and expressly stated as a reservation" (comments transmitted by a note verbale dated 4 February 1964, A/CN.4/175, p. 78; see also pp. 70–71); here again, this was not a "positive" definition of interpretative declarations, and the insertion proposed was more a matter for the legal regime of reservations than their definition. Moreover, this proposal is incompatible with the definition of reservations eventually retained, which consists in eliminating all nominalism ("however phrased or named").

[144] On the possibility of jointly formulating interpretative declarations, see guideline 1.2.1 and commentary thereto.

reservation.[145] It is in fact this shared feature which is at the origin of the entire difficulty of drawing a distinction: they look the same; in form, virtually nothing[146] distinguishes them.

(14) The second point in common between reservations and interpretative declarations has to do with the irrelevance of the phrasing or name chosen by their author.[147] This element, which automatically stems, *a fortiori*, from the very definition of reservations,[148] is confirmed by the practice of States and international organizations, which, when faced with unilateral declarations submitted as interpretative declarations by their authors, do not hesitate to object to them by expressly considering them to be reservations.[149] Similarly, nearly all the writers who have recently looked into this fine distinction between reservations and interpretative declarations give numerous examples of unilateral declarations which are presented as interpretative declarations by the States formulating them, but which they themselves regard as reservations, and *vice versa*.[150]

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[145] Cf. F. Horn, footnote 25 above, p. 236.

[146] Unlike reservations, interpretative declarations can be formulated orally, although this is not desirable (see guideline 2.4.1 (Form of interpretative declarations)).

[147] See Monika Heymann, *Einseitige Interpretationserklärungen zu multilateralen Verträgen* (Berlin, Duncker & Humblot, 2005), pp. 34–37.

[148] See guideline 1.1.

[149] There are countless examples of this phenomenon. To mention only a few that relate to recent conventions, there are:

The objection of the Netherlands to Algeria's interpretative declaration concerning paragraphs 3 and 4 of article 13 of the International Covenant on Economic, Social and Cultural Rights (*Multilateral Treaties* ..., chap. IV.3). The reactions of many States to the declaration by the Philippines in respect of the 1982 Law of the Sea Convention (*ibid.*, chap. XXI.6). The objection of Mexico, which considered that the third declaration, formally called interpretative, of the United States of America to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 constituted "a modification of the Convention contrary to the objective of the latter" (*ibid.*, chap. VI.19). The reaction of Germany to a declaration by which the Tunisian Government indicated that it would not adopt, in implementation of the Convention on the Rights of the Child of 20 November 1989, "any legislative or statutory decision that conflicts with the Tunisian Constitution" (*ibid.*, chap. IV.11). It also happens that "reacting" States contemplate both solutions and express their reactions in accordance with whether the text is a reservation or an interpretative declaration, again regardless of the term used by the author to designate it. Germany, the United Kingdom and the United States of America reacted to an interpretative declaration by Yugoslavia concerning the 1971 Seabed Treaty by considering it first as an actual interpretative declaration (which they rejected) and then as a reservation (which they considered to be late and inconsistent with the object and purpose of the Treaty) (example cited by Luigi Migliorino, "Declarations and Reservations to the 1971 Seabed Treaty", *I.Y.B.I.L.* 1985, p. 110). In the same spirit, the Federal Republic of Germany and the Netherlands objected to declarations made by the countries of Eastern Europe with regard to "the definition of piracy as given in the Convention insofar as the said declarations are to be qualified as reservations" (*Multilateral Treaties* ..., chap. XXI.2). Likewise, several States questioned the real nature of the (late) "declarations" by Egypt concerning the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (see in particular the reaction of Finland: "Without taking any stand on the content of the declarations, which appear to be reservations in nature ...", *ibid.*, chap. XXVII.3); see also para. (6) above. Judges and arbitrators also do not hesitate to question the true nature of unilateral declarations formulated by a State in respect of a treaty and, as appropriate, to call it something else; see the examples given below in the commentary to guideline 1.3.2 (Phrasing and name).

[150] See, for example, Derek Bowett, "Reservations to Non-Restricted Multilateral Treaties", *B.Y.B.I.L.* 1976–1977, p. 68; F. Horn, footnote 25 above, pp. 278–324; D.M. McRae, footnote 129 above, p. 162, footnote 1; L. Migliorino, footnote 149 above, pp. 106–123; R. Sapienza,

(15) It follows that, like reservations, interpretative declarations are unilateral statements formulated by a State or an international organization, it being unnecessary to be concerned about how they are phrased or named by the author.[151] The two instruments are, however, very different in terms of the objective pursued by the author.

(16) As the definition of reservations makes clear, they aim "to exclude or to modify the legal effect of certain provisions of the treaty in their application" to their author[152] or to certain specific aspects of the treaty as a whole.[153] As their name indicates, interpretative declarations have a different objective: they are aimed at *interpreting* the treaty as a whole or certain of its provisions.

(17) This can — and must — constitute the central element of their definition, yet it poses difficult problems[154] nonetheless, the first of which is determining what is meant by "interpretation", a highly complex concept, the elucidation of which would far exceed the scope of the present Guide.[155]

(18) Suffice it to say, in a phrase often recalled by the International Court of Justice, that "the expression 'to construe' ("*interprétation*" in French) must be understood as meaning to give a precise definition of the meaning and scope" of a binding legal instrument,[156] in this

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footnote 129 above, pp. 154–176; or Rosa Riquelme Cortado, *Las reservas a los tratados, Lagunas y Ambigüedades del Regimen de Viena* (Universidad de Murcia, 2004), pp. 380–381.

[151] This does not mean that the phrasing or name chosen has no impact whatsoever on the distinction. As may be seen from guideline 1.3.2, they may give an indication as to the purported legal effect.

[152] See guideline 1.1, para. 1.

[153] See guideline 1.1, para. 2.

[154] See also M. Heymann, footnote 147 above, pp. 37–38.

[155] Regarding the concept of interpretation, see in particular the reports by Hersch Lauterpacht at the Institute of International Law, "De l'interprétation des traités", *IIL Yearbook*, 1950, pp. 366–423, and 1952, vol. I, pp. 197–223, and vol. II, pp. 359–406; V.D. Degan, *L'interprétation des accords en droit international* (The Hague, Nijhoff, 1963), p. 176; Myres S. McDougall, H.D. Laswell and J.C. Miller, *The Interpretation of Agreements and World Public Order* (Yale University Press, 1967), 410 pp., and Dordrecht, Nijhoff, 1993, 536 pp.; Serge Sur, *L'interprétation en droit international public* (Paris, LGDJ, 1974), 449 pp.; Mustapha Kamil Yasseen, "L'interprétation des traités d'après la Convention de Vienne", *Recueil des cours ...*, 1976-III, vol. 151, pp. 1–114; or Marteen Bos, "Theory and Practice of Treaty Interpretation", *Netherlands International Law Review* 1980, pp. 3–38 and 135–170; Anthony Aust, *Modern Treaty Law and Practice* (New York, Cambridge University Press, second edition, 2007), pp. 230–233; Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht, Springer, 2007), pp. 10–13; Richard K. Gardiner, *Treaty Interpretation* (Oxford, Oxford University Press, 2008), pp. 26–33; Alexander Orakhelashvili, "The Recent Practice on the Principles of Treaty Interpretation", in Alexander Orakhelashvili and Sarah Williams, *40 Years of the Vienna Convention on the Law of Treaties* (London, British Institute of International and Comparative Law, 2010), p. 117; Panos Merkouris, "Introduction: Interpretation is a Science, is an Art, is a Science", in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris, *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Leiden, Martinus Nijhoff Publishers, 2010), pp. 1–13.

[156] See the Judgment of 16 December 1927, *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Permanent Court of International Justice Series A*, No. 13, p. 10; see also the Judgment of 27 November 1950, *Request for interpretation of the Judgment of November 20th, 1950, in the Asylum case, I.C.J. Reports 1950*, p. 402.

case a treaty. What is essential is that interpreting is not revising.[157] While the aim of reservations is to modify, if not the text of the treaty, at least the legal effect of its provisions, interpretative declarations are in principle limited to clarifying the meaning and the scope that their author attributes to the treaty or to certain of its provisions. Since the phrase "purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions" paraphrases the commonly accepted definition of the word "interpretation", the Commission considered that it would be tautological to include the term "to interpret" in the body of guideline 1.2.

(19) The expression "the meaning or scope attributed by the declarant to the treaty" introduces a subjective element into the definition of interpretative declarations, although any unilateral interpretation is imbued with subjectivity.[158] Moreover, in accordance with the very spirit of the definition of reservations, they may be distinguished from other unilateral declarations made with regard to a treaty by the legal effect *aimed at* by the declarant, *i.e.* by its *intention* (inevitably subjective). There is no reason to depart from the spirit of this definition as far as interpretative declarations are concerned.[159]

(20) In accordance with an extremely widespread practice, the interpretation that is the subject of such declarations may relate either to certain provisions of a treaty or to the treaty as a whole.[160] The gap in the 1969, 1978 and 1986 Vienna Conventions on that point, which led the Commission to insert paragraph 2 into guideline 1.1 on "across-the-board" reservations in order to take account of the practice actually followed by States and international organizations, was thus remedied by the wording adopted for guideline 1.2.

(21) The Commission considered whether the temporal element which is present in the definition of reservations[161] ought to be included in the definition of interpretative declarations. But determined it seemed to the Commission that the practical considerations which were based on the concern to avoid abuses and which led the framers of the 1969, 1978 and 1986 Vienna Conventions to adopt that solution[162] do not arise with the same force in respect of interpretative declarations,[163] at least those which the declarant formulates without making the proposed interpretation a condition for its participation.[164]

(22) In any event, such temporal limitations are not justified with respect to interpretative declarations.[165] And it is not without relevance that the rules relating to reservations and those devoted to the interpretation of treaties appear in separate parts of the 1969 and 1986 Vienna Conventions: the former in Part II, relating to the conclusion and entry into force of treaties,

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[157] Advisory Opinion of 18 July 1950, *Interpretation of peace treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*, p. 229, or the Judgment of 27 August 1952, *Rights of nationals of the United States of America in Morocco, I.C.J. Reports 1952*, p. 196.

[158] An *agreement* on interpretation constitutes an authentic (supposedly "objective") interpretation of the treaty (see guideline 1.6.3).

[159] M. Heymann, footnote 147 above, p. 87.

[160] Among a great many examples, see the interpretative declaration of Thailand concerning the Convention on the Elimination of All Forms of Discrimination against Women (*Multilateral Treaties* ..., chap. IV.8) or that of New Zealand to the 1976 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (*ibid.*, chap. XXVI.1); see also above, the declaration by the United Kingdom cited in footnote 128.

[161] "'Reservation' means a unilateral statement ... made by a State or an international organization *when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty* ..." (guideline 1.1, para. 1, emphasis added).

[162] See paras. (7) to (12) of the commentary to guideline 1.1.

[163] See guideline 2.4.4 and commentary thereto.

[164] See guideline 1.4 and commentary thereto.

[165] See guideline 2.4.4 (Time at which an interpretative declaration may be formulated).

and the latter in Part III, where they are found side-by-side with the provisions relating to the observance and application of treaties.[166]

(23) This is to say that interpretative declarations formulated unilaterally by States or international organizations concerning the meaning or scope of the provisions of a treaty are and can be only some of the elements of the interpretation of such provisions. They coexist with other simultaneous, prior or subsequent interpretations which may be made by other contracting States or contracting organizations or third bodies entitled to give an interpretation that is authentic and binding on the parties.

(24) Thus, even if an instrument made by a party "in connection with the conclusion of a treaty" can, under certain conditions, be considered for the purposes of interpreting the treaty to be part of the "context", as expressly provided in article 31, paragraph 2 (b), of the 1969 and 1986 Vienna Conventions, this does not imply any exclusivity *ratione temporis*. Moreover, paragraph 3 of article 31 expressly invites the interpreter to take "into account, together with the context", any subsequent agreement between the parties and any subsequent practice followed. Such subsequent agreements or practices may be supported by interpretative declarations that may be formulated at any time in the life of the treaty: at its conclusion, at the time a State or international organization expresses its consent to be bound, or during the application of the treaty.[167]

(25) This was the position taken by Sir Humphrey Waldock in his fourth report on the law of treaties, in which he pointed out that a declaration could have been made

> "during the negotiations, or at the time of signature, ratification, etc., or later, in the course of the 'subsequent practice'".[168]

(26) Independently of these general considerations, to confine the formulation of interpretative declarations to a limited period of time, as the definition of reservations does, would have the serious drawback of being inconsistent with practice. Even if it is quite often at the moment they express their consent to be bound that States and international organizations formulate such declarations, that is not always the case.

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[166] In fact, there is no gap between the formation and the application of international law or between interpretation and application: "*La mise en œuvre de règles suppose leur interprétation préalable. Elle peut être explicite ou implicite, et dans ce cas se confond avec les mesures d'application*" ("The implementation of rules implies that they have already been interpreted. Implementation may be explicit or implicit, in which case it may become confused with measures of application"), (Serge Sur in Jean Combacu and Serge Sur, *Droit international public* (Paris, Montchrestien, ninth edition, 2010), p. 169). Some have even gone so far as to affirm that "*La règle de droit, dès l'instant de sa création jusqu'au moment de son application aux cas singuliers est une affaire d'interprétation*" ("the rule of law, from the moment of its creation to the moments of its application to individual cases, is a matter of interpretation") (A.J. Arnaud, "Le médium et le savant – signification politique de l'interprétation juridique", *Archives de philosophie du droit*, 1972, p. 165) (quoted by Denys Simon in *L'interprétation judiciaire des traités d'organisations internationales* (Paris, Pedone, 1981), p. 7).

[167] This last possibility was recognized by the International Court of Justice in its Advisory Opinion of 11 July 1950 concerning the International Status of South-West Africa: "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument" (*I.C.J. Reports 1950*, pp. 135–136); in fact, the Court based itself on declarations made by South Africa in 1946 and 1947 on the interpretation of its mandate over South-West Africa, an agreement that had been concluded in 1920.

[168] *Yearbook ... 1964*, vol. II, p. 52.

(27) It is indeed striking to note that States tend to get around the *ratione temporis* limitation of the right to formulate reservations by submitting them, occasionally out of time, as interpretative declarations. This was the case, for example, of the "declaration" made by Yugoslavia in respect of the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof[169] or of the declaration made by Egypt regarding the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.[170] In these two cases, the "declarations" elicited protests on the part of the other contracting States, who were motivated by the fact that the declarations were actually reservations and, in the second case, the fact that article 26 of the Basel Convention (which prohibits reservations) authorizes States to formulate declarations, within certain limits, only "when signing, ratifying, accepting, approving, ... confirming or acceding to this Convention". One can conclude *a contrario* that, if true interpretative declarations had been involved (and if the Basel Convention had not set any time limits), the declarations could have been formulated at a time other than the moment of signature or consent to be bound.

(28) This is in fact quite normal in practice. It should be pointed out, as Professor Greig does, that when they formulate objections to reservations or react to interpretative declarations formulated by other contracting States or contracting organizations, States and international organizations often go on to propose their own interpretation of the treaty's provisions.[171] There is no *prima facie* reason not to consider such "counter-proposals" as veritable interpretative declarations, at least when they seek to clarify the meaning and scope of the treaty in the eyes of the declarant;[172] however, they are by definition formulated after the time at which the formulation of a reservation is possible.

(29) Under these circumstances, it would hardly seem possible to include in a general definition of interpretative declarations a specification of the time at which such a declaration is to be made.

(30) The Commission wishes to make it clear, however, that the fact that guideline 1.2 is silent about the moment at which an interpretative declaration may be made, out of concern not to limit unduly the freedom of action of States and international organizations and not to go against a well-established practice, should not be seen as encouragement to formulate such declarations at inappropriate times. Even though "simple" interpretative declarations[173] are not binding on the other contracting States or contracting organizations, such an attitude could lead to abuse and create difficulties. By way of a remedy, it might be expedient for the parties to a treaty to try to avoid undesirable interpretative declarations by specifying in a limitative manner when such declarations may be made, as is done in the 1982 United Nations Convention on the Law of the Sea[174] and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.[175]

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[169] See footnote 149 above.

[170] See *Multilateral Treaties* ..., chap. XXVII.3, note 8.

[171] In this connection, see D.W. Greig, footnote 28 above, pp. 24 and 42–45. See the example cited by this author (p. 43) of the reactions of the Netherlands to the reservations of Bahrain and Qatar to article 27, paragraph 3, of the Vienna Convention on Diplomatic Relations or the "counter-interpretation" of articles I and II of the Non-Proliferation Treaty made by the United States of America in reaction to point 8 of the Italian declaration concerning that treaty (United Nations, *Treaty Series*, vol. 1078, pp. 417–418).

[172] See also guideline 2.9.2 and commentary thereto.

[173] As opposed to conditional interpretative declarations, which are the subject of guideline 1.4.

[174] Article 310: "Article 309 [which excludes reservations] does not preclude a State, *when signing, ratifying or acceding to this Convention*, from making declarations or statements, however

(31) The silence of guideline 1.2 on the moment when an interpretative declaration may be formulated should not lead one to conclude, however, that an interpretative declaration may in all cases be formulated at any time:

- for one thing, this might be formally prohibited by the treaty itself;[176]
- furthermore, it would seem to be out of the question that a State or international organization could formulate a *conditional* interpretative declaration[177] at any time in the life of the treaty: this would cast an unacceptable doubt on the existence and scope of the treaty obligations;
- and, lastly, even simple interpretative declarations can be formulated at any time and be modified only to the extent that they have not been expressly accepted by the other contracting States or contracting organizations to the treaty or have created an estoppel in their favour.

(32) These are questions that are clarified in Part 2 of the Guide to Practice, on the formulation of reservations and interpretative declarations.[178]

(33) It goes without saying that this definition in no way prejudges the validity or the effect of such declarations and that the same precautions taken with respect to reservations must be applied to interpretative declarations: the proposed definition is without prejudice to the permissibility and the effects of such declarations from the standpoint of the rules applicable to them.

(34) In the light of this comment, the definition in guideline 1.2 has, in the Commission's view, the dual advantage of making it possible to distinguish clearly between interpretative declarations and reservations, on the one hand, and, on the other, between interpretative declarations and other unilateral statements made in respect of a treaty, while being sufficiently general to encompass different categories of interpretative declarations.[179]

1.2.1 Interpretative declarations formulated jointly

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral character of that interpretative declaration.

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phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State" (emphasis added).

[175] Article 26: "1. No reservation or exception may be made to this Convention. 2. Paragraph 1 of this Article does not preclude a State or political and/or economic integration organization, *when signing, ratifying, accepting, approving, formally confirming or acceding to this Convention*, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State" (emphasis added).

[176] See the examples given in footnotes 174 and 175 above. See also guideline 3.5 and the commentary thereto.

[177] See guideline 1.4 and the commentary thereto.

[178] See in particular guideline 2.4.4 (Time at which an interpretative declaration may be formulated) and commentary thereto.

[179] On ways of applying this distinction, see guidelines 1.3 to 1.3.3.

Commentary

(1) Like reservations, interpretative declarations may be formulated jointly by two or more States or international organizations. Guideline 1.1.5, which acknowledges this possibility in respect of reservations, nonetheless appears to be an element of progressive development of international law, since there is no clear precedent in this regard.[180] The same is not true with regard to interpretative declarations, the joint formulation of which comes under the heading of *lex lata*.

(2) Indeed, as in the case of reservations, it is not uncommon for several States to consult one another before formulating identical or quite similar declarations. This was the case, for example, with several interpretative declarations formulated by the "Eastern bloc" countries prior to 1990,[181] with those made by the Nordic countries in respect of several conventions,[182] or with the declarations made by 13 States members of the European Community when signing the 1993 Convention on the Prohibition of Chemical Weapons and confirmed upon ratification, which stated:

> "As a Member State of the European Community, [each State] will implement the provisions of the Convention on the Prohibition of Chemical Weapons, in accordance with its obligations arising from the rules of the Treaties establishing the European Communities to the extent that such rules are applicable."[183]

(3) At the same time, and contrary to what has occurred thus far in reservations, there have also been truly joint declarations, formulated in a single instrument, by "the European Community [now the European Union] and its Member States" or by the latter alone. This occurred in the case of:

- examination of the possibility of accepting annex C.1 of the 1976 Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials;[184]
- implementation of the United Nations Framework Convention on Climate Change of 9 May 1992;[185]
- implementation of the Convention on Biological Diversity of 5 June 1992;[186]
- implementation of the Agreement of 4 August 1995 on Straddling Fish Stocks;[187]
- implementation of the WHO Framework Convention on Tobacco Control of 21 May 2003.[188]

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[180] See the commentary to guideline 1.1.5, para. 3.

[181] See, for example, the declarations by Belarus, Bulgaria, Hungary, Mongolia, Romania, the Russian Federation and Ukraine concerning articles 48 and 50 of the Vienna Convention on Diplomatic Relations (Cuba formulated an express reservation; the wording of Viet Nam's declaration is ambiguous) (*Multilateral Treaties* ..., chap. III.3) or those of Albania, Belarus, Bulgaria, Poland, Romania, the Russian Federation and Ukraine concerning article VII of the Convention on the Political Rights of Women (*ibid.*, chap. XVI.1).

[182] See, for example, the declarations by Denmark, Finland, Iceland, Norway and Sweden concerning article 22 of the Vienna Convention on Consular Relations (*ibid.*, chap. III.6).

[183] *Ibid.*, chap. XXVI.3.

[184] *Ibid.*, chap. XIV.5.

[185] *Ibid.*, chap. XXVII.7.

[186] *Ibid.*, chap. XXVII.8.

[187] *Ibid.*, chap. XXI.7.

[188] *Ibid.*, chap. IX.4.

(4) These are real precedents which justify *a fortiori* the adoption of a guideline on interpretative declarations similar to guideline 1.1.5 on reservations.

(5) As with reservations, it must be understood, first, that this possibility of joint formulation of interpretative declarations cannot undermine the legal regime applicable to such declarations, governed largely by "unilateralism"[189] and, second, that the conjunction "or" used in guideline 1.2.1[190] does not exclude the possibility that interpretative declarations may be formulated jointly by one or more States or by one or more international organizations, and should be understood to mean "and/or". Nevertheless, the Commission considered that this formulation would make the text too cumbersome.[191]

(6) The similarity between the wording of guidelines 1.1.5 and 1.2.1 does not mean that the same legal regime is applicable to interpretative declarations formulated jointly, on the one hand, and to reservations formulated jointly, on the other. In particular, the fact that the former may be formulated orally while the latter may not could have an effect on that regime. This problem relates to the substance of the applicable law, however, and not to the definition of interpretative declarations.

(7) The Commission also considered whether there might be reason to envisage the possibility of all of the contracting States or contracting organizations formulating an interpretative declaration jointly, and whether in such a situation the proposed interpretation would not lose the character of a unilateral act and become a genuinely collective act. The Commission concluded that this is not the case: the word "several" in guideline 1.2.1 precludes such a possibility, which in any case is covered by article 31, paragraphs 2 (a) and 3 (a), of the 1969 and 1986 Vienna Conventions concerning collateral agreements relating to the interpretation or application of the treaty.

1.3 Distinction between reservations and interpretative declarations

The character of a unilateral statement as a reservation or as an interpretative declaration is determined by the legal effect that its author purports to produce.

Commentary

(1) A comparison of guidelines 1.1 and 1.2 shows that interpretative declarations are distinguished from reservations principally by the objective pursued by the author State or international organization: in formulating a reservation, the State or organization purports to exclude or modify the legal effect upon itself of certain provisions of a treaty (or of the treaty as a whole with respect to certain specific aspects); in making an interpretative declaration, it intends to specify or clarify the meaning or scope that it attributes to a treaty or to certain of its provisions.

(2) In other words,

- the character of a unilateral statement as a reservation depends on whether its object is to exclude or modify the legal effect of the provisions of the treaty in their application to the author State or international organization; and

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[189] See para. (8) of the commentary to guideline 1.1.5.

[190] "... by several States or international organizations ...".

[191] See para. (9) of the commentary to guideline 1.1.5.

- the character of a unilateral statement as an interpretative declaration depends on whether its object is to specify or clarify the meaning or scope attributed by its author to a treaty or to certain of its provisions.

(3) This is confirmed in the jurisprudence. For example, in the *Belilos* case, "[l]ike the Commission and the Government, the [European] Court [of Human Rights] recognizes that it is necessary to ascertain the *original intention* of those who drafted the declaration".[192] Likewise, in the *Case concerning the delimitation of the continental shelf*, the Anglo-French Arbitral Tribunal held that, in order to determine the nature of the reservations and declarations made by France regarding the 1958 Convention on the Continental Shelf, "[t]he question [was] one of *the respective intentions* of the French Republic and the United Kingdom in regard to their legal relations under the Convention ...".[193]

(4) This distinction is fairly clear as to its principle, yet it is not easily put into practice, particularly since States and international organizations seldom explain their intentions, even taking pains at times to disguise them, and since the terminology used does not constitute an adequate criterion for distinguishing them. The objective of this section of the Guide to Practice is to provide some information regarding the substantive rules that should be applied in order to distinguish between reservations and interpretative declarations.

(5) These guidelines may be transposed, *mutatis mutandis*, to the equally important distinction between simple interpretative declarations and conditional interpretative declarations which, as guideline 1.4 shows, is also based on the intention of the author. In both cases, the author of the declaration seeks to interpret the treaty, but in the first case it does not make its interpretation a condition for participation in the treaty, whereas in the second case its interpretation cannot be dissociated from the expression of its consent to be bound.

1.3.1 Method of determining the distinction between reservations and interpretative declarations

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, the statement should be interpreted in good faith in accordance with the ordinary meaning to be given to its terms, with a view to identifying therefrom the intention of its author, in light of the treaty to which it refers.

Commentary

(1) The object of this guideline is to indicate the *method* that should be adopted to determine whether a unilateral statement is a reservation or an interpretative declaration. This question is of considerable importance when, in keeping with the definition of such instruments,[194] all "nominalism" is excluded.

(2) As guideline 1.3 makes clear, the decisive criterion for drawing the distinction is the legal effect that the State or international organization making the unilateral statement

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[192] European Court of Human Rights, 29 April 1988, *Publications of the European Court of Human Rights, Series A*, vol. 132, para. 48, p. 23; emphasis added.

[193] Decision of 30 June 1977, footnote 24 above, *R.I.A.A.*, vol. XVIII, para. 30, p. 28; emphasis added.

[194] See guidelines 1.1 and 1.2, which expressly define them independently of their phrasing or name. The fact remains, however, that the latter are of no utility in drawing the distinction (see guideline 1.3.2).

purports to produce. Hence, there can be no doubt that the author's intention when formulating it should be established: did the author purport to exclude or modify the legal effect upon it of certain provisions of the treaty (or of the treaty as a whole in respect of certain aspects), or did it intend to specify or clarify the meaning or scope it attributes to the treaty or certain of its provisions? In the first case it is a reservation; in the second, it is an interpretative declaration.[195]

(3) It was asked whether, in the writings, in order to answer these questions, it was appropriate to apply a "subjective test" (what did the author *want* to say?) or "objective" or "material" test (what did the author *do*?). In the Commission's view, this is a spurious alternative. The expression "purports to", which appears in the definition both of reservations and of interpretative declarations, simply means that the legal effect sought by the author cannot be achieved for various reasons (impermissibility, objections by other contracting States and organizations); but this does not in any way mean that the subjective test alone is applicable: only an objective analysis of the potential effects of the statement can determine the purpose sought. In determining the legal nature of a statement formulated in connection with a treaty, the decisive criterion lies in the effective result that implementing the statement has (or would have). If it results (or would result) in modifying or excluding the legal effect of the treaty or certain of its provisions, it is a reservation "however phrased or named"; if the statement simply clarifies the meaning or scope that its author attributes to the treaty or certain of its provisions, it is an interpretative declaration.

(4) The point of departure should be the principle that the intended purpose is reflected in the text of the statement. The problem is therefore a conventional one of interpretation. "Discerning the real substance of the often complex statements made by States upon ratification of, or accession to, a multilateral treaty is a matter of construction and must be solved through the ordinary rules of interpretation."[196]

(5) Some international courts have not hesitated to apply the general rules of interpretation of treaties to reservations.[197] However, in the Commission's view, while these rules provide useful indications, they cannot be purely and simply transposed to reservations and interpretative declarations because of their special nature. The rules applicable to *treaty* instruments cannot be applied to *unilateral* instruments without some care.[198]

(6) This was pointed out recently by the International Court of Justice in connection with declarations of acceptance of its compulsory jurisdiction:

> "The regime relating to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties (...) The Court observes that the provisions of that Convention may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction."[199]

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[195] See also M. Heymann, footnote 147 above, pp. 88–92; R. Riquelme Cortado, footnote 151 above, pp. 37–39.

[196] Massimo Coccia, "Reservations to Multilateral Treaties on Human Rights", *California Western International Law Journal*, vol. 15, 1985, p. 10.

[197] See Inter-American Court of Human Rights, Advisory Opinion of 8 September 1983, OC-3/83, *Restrictions to the death penalty (articles 4 (2) and 4 (4) of the Inter-American Convention on Human Rights)*, para. 62, p. 84.

[198] On the interpretation of reservations in general, see guideline 4.2.6.

[199] I.C.J., Judgment of 4 December 1998, case concerning *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court*, para. 46; see also the Judgment of 11 June 1998 in *Land and maritime boundary between Cameroon and Nigeria (Preliminary Objections)*, para. 30.

(7) The Commission is aware that the statements in question are of a different nature from those of reservations and declarations. Formulated unilaterally in connection with a treaty text, they nonetheless have important common features, and it would seem necessary to take account of the Court's warning in interpreting unilateral statements made by a State or an international organization in connection with a treaty with a view to determining its legal nature. Bearing these considerations in mind, the Commission did not purely and simply refer to the "General rule of interpretation" and the "Supplementary means of interpretation" set out in articles 31 and 32 of the 1969 and 1986 Vienna Conventions.[200]

(8) This remark notwithstanding, the fact remains that these provisions constitute useful guidance and, in particular, like a treaty, a unilateral statement relating to the provisions of a treaty:

> "... must be interpreted by examining its text in accordance with the ordinary meaning which must be attributed to the terms in which it has been formulated within the general context of the treaty (...). This approach must be followed except when the resultant interpretation would leave the meaning ambiguous or obscure or would lead to a result which is manifestly absurd or unreasonable. (...)".[201]

(9) Even though doctrine has barely contemplated the problem from this standpoint,[202] jurisprudence is unanimous in considering that priority must be given to the actual text of the declaration:

> "This condition [imposed by the third French reservation to article 6 of the Geneva Convention on the Continental Shelf], *according to its terms*, appears to go beyond a mere interpretation ... the Court, ... accordingly, concludes that this 'reservation' is to be considered a 'reservation' rather than an 'interpretative declaration'";[203]
>
> "In the instant case, the Commission will interpret the intention of the respondent Government by taking account both of *the actual terms of the above-mentioned interpretative declaration* and the *travaux préparatoires* which preceded Switzerland's ratification of the [European] Convention [on Human Rights].
>
> "The Commission considers that *the terms used, taken by themselves*, already show an intention by the Government to prevent ...
>
> [...]
>
> "*In the light of the terms used* in Switzerland's interpretative declaration ... and the above-mentioned *travaux préparatoires* taken as a whole, the Commission accepts the respondent Government's submission that it intended to give this interpretative declaration the effect of a formal reservation";[204]

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[200] See guideline 4.2.6 (Interpretation of reservations) and the commentary thereto; see also M. Heymann, footnote 147 above, p. 89.

[201] Inter-American Court of Human Rights, Advisory Opinion of 8 September 1983, footnote 197 above, para. 63, p. 84.

[202] See, however, F. Horn, footnote 25 above, pp. 33 and 263–272 and, for a clearer and more concise account, D.W. Greig, footnote 28 above, p. 26.

[203] Decision of 30 June 1977, footnote 24 above, *R.I.A.A.*, vol. XVIII, para. 55, pp. 169–170; emphasis added.

[204] European Commission of Human Rights, decision of 5 May 1982, *Temeltasch* case, *Decisions and Reports*, April 1983, paras. 74, 75 and 82, pp. 131–132.

> "In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine *the substantive content*";[205]
>
> "If the statement displays a clear intent on the part of the State party to exclude or modify the legal effect of a specific provision of a treaty, it must be regarded as a binding reservation, even if the statement is phrased as a declaration. In the present case, the statement entered by the French Government upon accession to the [1966 International] Covenant [on Civil and Political Rights] is clear: it seeks to exclude the application of article 27 to France and emphasizes this exclusion semantically with the words: 'is not applicable'."[206]

(10) More rarely, international courts which have had to rule on problems of this type, to supplement their reasoning, have based themselves on the preparatory work of the unilateral declarations under consideration. In the *Belilos* case, for example, the European Court of Human Rights, after admitting that "the wording of the original French text" of the Swiss declaration, "though not altogether clear, can be understood as constituting a reservation,"[207] "[l]ike the Commission and the Government, ... recognizes that it is necessary to ascertain the original intention of those who drafted the declaration" and, in order to do so, takes into account the preparatory work on the declaration,[208] as the Commission had done in the same case and in the *Temeltasch* case.[209]

(11) In the Commission's view, some caution is required in this regard. As has been noted, "[s]ince a reservation is a unilateral act by the party making it, evidence from that party's internal sources regarding the preparation of the reservation is admissible to show its intention in making the reservation".[210] Still, in the everyday life of the law it would appear difficult to recommend that the preparatory work be consulted regularly in order to determine the nature of a unilateral declaration relating to a treaty: it is not always made public,[211] and in any case it would be difficult to require foreign Governments to consult it.

(12) This is the reason why guideline 1.3.1 does not reproduce the text of article 32 of the 1969 and 1986 Vienna Conventions and, without alluding directly to the preparatory work, merely calls for account to be taken of the intention of the author of the statement. This

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[205] European Court of Human Rights, Judgment of 29 April 1988, *Belilos* case, *Publications of the European Court of Human Rights*, Series A, vol. 132, para. 42, p. 24. In the same case, the Commission reached a different conclusion, also basing itself "both on the wording of the declaration and on the preparatory work (*ibid.*, para. 41, p. 21); the Commission, more clearly than the Court, gave priority to the terms used in the Swiss declaration (para. 93 of the Commission's report; see the commentary by Iain Cameron and Frank Horn, "Reservations to the European Convention on Human Rights: The Belilos Case", *G.Y.I.L.* 1990, pp. 71–74).

[206] Human Rights Committee, *Communication No. 220/1987*, decision of 8 November 1989, *T.K. v. France*, report of the Human Rights Committee, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40* (A/45/40), annex X, para. 8.6, p. 140.

[207] European Court of Human Rights, Judgment of 29 April 1988, *Belilos* case, *Publications of the European Court of Human Rights*, Series A, vol. 132, para. 44, para. 49, p. 22.

[208] *Ibid.*, para. 48, p. 23.

[209] European Commission of Human Rights, decision of 5 May 1982, *Temeltasch* case, *Decisions and Reports*, April 1983, paras. 76–80, pp. 131–132.

[210] Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law*, 9th ed., vol. I, Peace, Longman, London, p. 1242. The authors cite in support the Judgment of the International Court of Justice of 19 December 1978 in the *Aegean Sea Continental Shelf* case, *I.C.J. Reports 1979*, p. 32.

[211] In the *Belilos* case, the representative of the Swiss Government referred to the internal debates within the Government, but took cover behind their confidential nature (see I. Cameron and F. Horn, footnote 205 above, p. 84).

wording draws directly on that used by the International Court of Justice in the case concerning *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court*:

> "The Court will ... interpret the relevant words of a declaration, including a reservation contained therein, in a natural and responsible way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court."[212]

(13) Guideline 1.3.1 also specifies that, for the purpose of determining the legal nature of a statement formulated in respect of a treaty, it shall be interpreted "in the light of the treaty to which it refers". This constitutes, in these circumstances, the principal element of the "context" mentioned in the general rule of interpretation set out in article 31 of the 1969 and 1986 Vienna Conventions:[213] whereas a reservation or an interpretive declaration constitutes a unilateral instrument, separate from the treaty to which it relates, it is still closely tied to it and cannot be interpreted in isolation.

(14) The method indicated in guideline 1.3.1 can be transposed to the distinction between simple interpretative declarations and conditional interpretative declarations.[214] In this case, too, it is the intention of the State or international organization making the declaration that has to be determined, and this should be done above all by interpreting it in good faith in accordance with the ordinary meaning to be given to its terms.

1.3.2 Phrasing and name

The phrasing or name of a unilateral statement provides an indication of the purported legal effect.

Commentary

(1) The general rule making it possible to determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration is set out in guideline 1.3.1. Guidelines 1.3.2 and 1.3.3 supplement this general rule by taking into consideration certain specific, frequently encountered situations which may facilitate the determination. They are therefore subsidiary to the general rule set out in guideline 1.3.1, not as a rule of interpretation but as a method for determining whether a unilateral statement constitutes a reservation or an interpretative declaration.

(2) As guidelines 1.3 and 1.3.1 make clear, it is not the phrasing or name of a unilateral statement formulated in respect of a treaty that determines its legal nature, but the legal effect it purports to produce. In fact, the result of the definition of reservations, given by the Vienna Conventions of 1969, 1978 and 1986 and reproduced in guideline 1.1, and of the definition of interpretative declarations found in guideline 1.2 is that:

- on the one hand, the character of both is imparted by the objective pursued by the author: excluding or modifying the legal effect of certain provisions of the treaty in their application to its author in the first instance, and specifying or clarifying the meaning or scope attributed by the author of the declaration to the treaty or to certain of its provisions, in the second instance;

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[212] Judgment of 4 December 1998, para. 49.

[213] In this regard, see the aforementioned advisory opinion of the Inter-American Court of Human Rights, para. 8, note 124.

[214] See guideline 1.4 and commentary thereto.

- and, on the other, the second point that reservations and interpretative declarations have in common has to do with the irrelevance of the phrasing or name given them by the author.[215]

(3) This indifference to the terminology chosen by the State or international organization formulating the statement has been criticized by some authors who believe that it would be appropriate to "take States at their word" and to consider as reservations those unilateral declarations which have been so titled or worded by their authors, and as interpretative declarations those which they have proclaimed to be such.[216] This position has the dual merit of simplicity (an interpretative declaration is whatever States declare is one) and of conferring "morality" on the practice followed in the matter by preventing States from "playing around" with the names they give to the declarations they make with a view to side-stepping the rules governing reservations or misleading their partners.[217]

(4) In the opinion of the Commission, however, this position runs up against two decisive objections:

- first, it is incompatible with the Vienna definition itself: if a unilateral declaration can be a reservation "however phrased or named", this of necessity means that simple "declarations" (even those expressly qualified as interpretative by their author) may constitute true reservations, but it also and necessarily implies that terminology is not an absolute criterion that can be used in defining interpretative declarations; and
- secondly, it runs counter to the practice of States, jurisprudence and the position of most doctrine.[218]

(5) It should be noted in particular that judges, international arbitrators and bodies monitoring the implementation of human rights treaties refrain from any nominalism and do not dwell on the appellation of the unilateral statements accompanying States' consent to be bound but endeavour to discover the true intention as it emerges from the substance of the declaration, or even the context in which it has been made.

(6) For example, the arbitral tribunal responsible for deciding the Anglo-French case concerning *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* carefully examined the argument of the United Kingdom that the third French reservation to article 6 of the 1958 Convention on the Continental Shelf was, in reality, a simple interpretative declaration.[219] Similarly, in the *Temeltasch* case, the European Commission of Human Rights, relying on article 2, paragraph 1 (d) of the Vienna Convention on the Law of Treaties, agreed

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[215] In both cases, this results from the formulation "however phrased or named".

[216] See, for example, the declaration made by France when signing the Treaty of Tlatelolco in 1973 and the analysis thereof by Hector Gros Espiell ("*La signature du Traité de Tlatelolco par la Chine et la France*", *A.F.D.I.* 1973, p. 141. However, the author also bases himself on other parameters). This was also the position taken by Japan in 1964 in its observations on the draft articles on the law of treaties adopted by the Commission on first reading (see the commentary to guideline 1.2, footnote 143).

[217] See para. (5) of the commentary to guideline 1.2.

[218] See *ibid.*, paras. (4) to (8).

[219] Decision of 30 June 1977, footnote 24 above, *R.I.A.A.*, vol. XVIII, paras. 54–55, pp. 169–170.

> "on this point with the majority of legal writers and considers that where a State makes a declaration, presenting it as a condition of its consent to be bound by the Convention and intending it to exclude or alter the legal effect of some of its provisions, such a declaration, *whatever it is called*, must be assimilated to a reservation ..."[220]

This position was also taken by the European Court of Human Rights in the *Belilos* case: Switzerland accompanied its instrument ratifying the European Convention on Human Rights by a unilateral statement which it entitled "interpretative declaration"; the Court nevertheless considered it to be a true reservation.

> "Like the Commission and the Government, the Court recognizes that it is necessary to ascertain the original intention of those who drafted the declaration [...].
>
> "In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content."[221]

The Human Rights Committee took the same line in its decision of 8 November 1989 in the case of *T.K. v. France*: on the basis of article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties, it decided that a communication concerning France's failure to respect article 27 of the International Covenant on Civil and Political Rights was inadmissible because the French Government, on acceding to the Covenant, had declared that "in the light of article 2 of the Constitution of the French Republic, [...] article 27 is not applicable so far as the Republic is concerned". The Committee observed:

> "in this respect that it is not the formal designation but the effect the statement purports to have that determines its nature".[222]

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[220] Decision of 5 May 1982, European Commission of Human Rights, *Decisions and Reports*, February 1983, paras. 69–82, pp. 146–148; emphasis added.

[221] Judgment of 29 April 1988, *Publications of the European Court of Human Rights*, Series A, vol. 132, paras. 48–49, pp. 23–24.

[222] Communication No. 220/1987, decision adopted on 8 November 1989; Report of the Human Rights Committee to the General Assembly, *Official Records, Forty-fifth Session, Supplement No. 40* (A/45/40), United Nations, New York, annex X, para. 8.6, p. 123. See also, to the same effect, the decisions *M.K. v. France* of the same date, communication No. 222/187 (pp. 127–133), and *S.G. v. France* of 1 November 1991 (No. 347/1988), *G.B. v. France* of 1 November 1991 (No. 348/1989) and *R.L.M. v. France* of 6 April 1992 (No. 363/1989). Report of the Human Rights Committee to the General Assembly, *Official Records, Forty-seventh Session, Supplement No. 40* (A/47/40), United Nations, New York, annex X, pp. 346–371. In an individual opinion which she attached to the decision on *T.K. v. France*, Mrs. Higgins criticized the Committee's position, pointing out that, in her view:

> "the matter [was not] disposed of by invocation of article 2 (1) (d) of the Vienna Convention on the Law of Treaties, which emphasizes that intent, rather than nomenclature, is the key".
>
> "An examination of the notification of 4 January 1982 shows that the Government of the Republic of France was engaged in two tasks: listing certain reservations and entering certain interpretative declarations. Thus in relation to articles 4 (1), 9, 14 and 19, it uses the phrase 'enters a reservation'. In other paragraphs it declares how terms of the Covenant are in its view to be understood in relation to the French Constitution, French legislation or obligations under the European Convention on Human Rights. To note, by reference to article 2 (1) (d) of the Vienna Convention, that it does not matter how a reservation is phrased or named, cannot serve to turn these interpretative declarations into reservations. Their content is clearly that of declarations. Further, the French notification shows that deliberately different language was selected to serve different legal purposes. There is no reason to suppose that the contrasting use, in different paragraphs, of the

(7) Nevertheless, this indifference to nominalism is not as radical as it might appear at first sight, since, in the *Belilos* case, the European Commission of Human Rights had maintained that

> "if a State made both reservations and interpretative declarations at the same time, the latter could only exceptionally be equated with the former".[223]

(8) From these observations the following conclusion may be drawn: while the phrasing and name of a unilateral declaration do not constitute part of the definition of an interpretative declaration any more than they do of the definition of a reservation, they nonetheless form an element of appraisal which must be taken into consideration and which can be viewed as being of particular (although not necessarily vital) significance when a State formulates both reservations and interpretative declarations in respect of a single treaty at the same time.

(9) This observation is consistent with the more general position taken by writers that "there is a potential for inequity in this aspect ['however phrased or named'] of the definition". "Under the Vienna Convention, the disadvantages of determining that a statement is a reservation are [...] imposed over the other parties to the treaty. [...] It would be unfortunate in such circumstances if the words 'however phrased or named' were given an overriding effect. In exceptional circumstances it might be possible for a party to rely upon an estoppel against a State which attempts to argue that its statement is a reservation. [...] While this is a matter of interpretation rather than the application of equitable principles, it is in keeping with notions of fairness and good faith which underlie the treaty relations of States."[224]

(10) Without reopening the debate on the principle posed by the Vienna Convention with regard to the definition of reservations, a principle which extends to the definition of interpretative declarations,[225] it would seem legitimate, then, to spell out the extent to which it is possible to remain indifferent to the nominalism implied by the expression "however named or phrased". This is the purpose of guideline 1.3.2, which acknowledges that the name a State gives to its declaration is nevertheless an indication of what it is, although it does not constitute an irrebuttable presumption.

(11) This indication, while still rebuttable, is reinforced when a State simultaneously formulates reservations and interpretative declarations and designates them respectively as such.

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phrase 'reservation' and 'declaration' was not entirely deliberate, with its legal consequence well understood by the Government of the Republic." (*Official Records, Forty-fifth Session, Supplement No. 40* (A/45/40), United Nations, New York, annex X, appendix II, p. 143.)

[223] Cf. the judgment of the Court in this case, 21 May 1988, *Publications of the European Court of Human Rights*, Series A, vol. 132, para. 41, p. 21. For its part, the Court observed that one of the things that made it difficult to reach a decision in the case was the fact that "the Swiss Government have made both 'reservations' and 'interpretative declarations' in the same instrument of ratification", although the Court did not draw any particular conclusion from that observation (*ibid.*, para. 49, p. 24). See also the individual opinion of Mrs. Higgins in the *T.K. v. France* case before the Human Rights Committee (footnote 222 above).

[224] D.W. Greig, footnote 28 above, pp. 27–28; see also p. 34.

[225] See guideline 1.2.

1.3.3 Formulation of a unilateral statement when a reservation is prohibited

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect of those provisions by a State or an international organization shall be presumed not to constitute a reservation. Such a statement nevertheless constitutes a reservation if it purports to exclude or modify the legal effect of certain provisions of the treaty, or of the treaty as a whole with respect to certain specific aspects, in their application to its author.

Commentary

(1) Guideline 1.3.3 has been worded in the same spirit as the preceding guideline and its purpose is to make it easier to say whether a unilateral statement formulated in respect of a treaty should be classified as a reservation or as an interpretative declaration when the treaty prohibits reservations in general,[226] or to certain of its provisions.[227]

(2) It seems to the Commission that, in such situations, statements made in respect of provisions to which any reservation is prohibited must be deemed to constitute interpretative declarations. "This would comply with the presumption that a State would intend to perform an act permitted, rather than one prohibited, by a treaty and protect the State from the possibility that the impermissible reservation would have the effect of invalidating the entire act of acceptance of the treaty to which the declaration was attached."[228] In a more general context, this presumption of permissibility is consonant with the "well-established general principle of law that bad faith is not presumed".[229]

(3) It goes without saying, however, that the presumption referred to in guideline 1.3.3 is not irrebuttable and that if the statement actually purports to exclude or modify the legal effect of the provisions of the treaty and not simply to interpret them, then it must be considered to be a reservation and the consequence of article 19, subparagraphs (a) and (b), of the 1969 and 1986 Vienna Conventions is that such a reservation is impermissible and must be treated as such. This is consistent with the principle of the irrelevance, in principle, of the phrasing or name of unilateral statements formulated in respect of a treaty, as embodied in the definition of reservations and interpretative declarations.[230]

(4) It is apparent from both the title of the guideline and its wording that the guideline's purpose is not to determine whether unilateral declarations formulated in the circumstances in question constitute interpretative declarations or unilateral statements other than reservations or interpretative declarations as defined in section 1.5 of the present chapter. This guideline draws attention to the principle that there can be no presumption that a declaration made in respect of treaty provisions to which a reservation is prohibited is a reservation.

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[226] As, for example, in the case of article 309 of the United Nations Convention on the Law of the Sea.

[227] As, for example, in the case of article 12 of the Geneva Convention on the Continental Shelf which deals with reservations to articles 1 to 3. See the arbitral decision of 30 June 1977, footnote 24 above, *R.I.A.A.*, vol. XVIII, paras. 38–39, pp. 161; see also the individual opinion of Herbert W. Briggs, *ibid.*, p. 262.

[228] D.W. Greig, footnote 28 above, 1995, p. 25.

[229] Arbitral decision of 16 November 1957, *Lac Lanoux* case (France/Spain), United Nations, *Reports of International Arbitral Awards*, vol. XII, p. 305.

[230] See guidelines 1.1 and 1.2.

(5) If this is not the case, it is for the interpreter of the declaration in question, which may be either an interpretative declaration or a declaration under section 1.5, to classify it positively on the basis of guidelines 1.2 and 1.5.1 to 1.5.3.

1.4 Conditional interpretative declarations

1. A conditional interpretative declaration is a unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof.

2. Conditional interpretative declarations are subject to the rules applicable to reservations.

Commentary

(1) In accordance with the definition given in guideline 1.2, interpretative declarations can be seen as "offers" of interpretation, governed by the fundamental principle of good faith, but lacking any inherent authentic or binding character. However, their authors frequently endeavour to broaden their scope, so that they come closer to being a reservation without actually becoming one. This is what happens when a State or international organization not merely proposes an interpretation but makes its interpretation a condition of its consent to be bound by the treaty.

(2) The Commission has recognized the existence of such a practice, which was not systematized in the legal doctrine until relatively recently,[231] while continuing to explore the exact legal nature of such unilateral statements.

(3) It is not uncommon for a State, when formulating a declaration, to state expressly that its interpretation constitutes the *sine qua non* to which its consent to be bound is subordinate.

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[231] The distinction between these two types of interpretative declaration was clearly and authoritatively drawn by McRae in an important article published in 1978. Exploring the effect of interpretative declarations, he noted that "two situations have to be considered. The first is where a State attaches to its instrument of acceptance a statement that simply purports to offer an interpretation of the treaty or part of it. This may be called a 'simple interpretative declaration' [They are referred to as 'mere declaratory statements' by Detter, *Essays on the Law of Treaties*, 1967, pp. 51–52]. The second situation is where a State makes its ratification of or accession to a treaty subject to, or on condition of, a particular interpretation of the whole or part of the treaty. This may be called a 'qualified interpretative declaration'. In the first situation the State has simply indicated its view of the interpretation of the treaty, which may or may not be the one that will be accepted in any arbitral or judicial proceedings. In offering this interpretation the State has not ruled out subsequent interpretative proceedings nor has it ruled out the possibility that its interpretation will be rejected. [...] If, on the other hand, the declaring State wishes to assert its interpretation regardless of what a subsequent tribunal might conclude, that is, the State when making the declaration has ruled out the possibility of a subsequent inconsistent interpretation of the treaty, a different result should follow. This is a 'qualified interpretative declaration'. The State is making its acceptance of the treaty subject to or conditional upon acquiescence in its interpretation". (D.M. McRae, footnote 129 above, pp. 160–161.) The expression "qualified interpretative declaration" has little meaning in French. This distinction has been used by a number of authors; for example, see I. Cameron and F. Horn, footnote 205 above, p. 77 or R. Sapienza, footnote 129 above, pp. 205–206, or M. Heymann, footnote 147, pp. 70 to 87.

For example, France attached to its signature[232] of Additional Protocol II of the Treaty of Tlatelolco a four-point interpretative declaration, stipulating:

> "In the event that the interpretative declaration thus made by the French Government should be contested wholly or in part by one or more Contracting Parties to the Treaty or to Protocol II, these instruments shall be null and void in relations between the French Republic and the contesting State or States."

The conditional nature of the French declaration here is indisputable. However, through the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (OPANAL), the Latin American States requested the French Government to withdraw the part of the French interpretative declaration that referred to the possibility of using nuclear weapons in the event of armed attack. Those States were of the opinion that such an interpretation did not comply with the requirements of necessity and proportionality inherent in the notion of self-defence under international law. France has not yet withdrawn this part of its interpretative declaration, but has repeatedly expressed its intention to remain a State party to the Additional Protocols to the Treaty of Tlatelolco.

(4) Although it is drafted less categorically, the same can surely be said of the "understanding" recorded by the Islamic Republic of Iran in connection with the United Nations Convention on the Law of the Sea:

> "The main objective [of the Government of the Islamic Republic of Iran] for submitting these declarations is the avoidance of eventual future interpretation of the following articles in a manner incompatible with the original intention and previous positions or in disharmony with national laws and regulations ..."[233]

(5) In other cases, the conditional nature of the declaration can be deduced from its drafting. For example, its categorical wording leaves little doubt that the interpretative declaration made by Israel upon signing the International Convention Against the Taking of Hostages of 17 December 1979 should be considered a conditional interpretative declaration:

> "It is the understanding of Israel that the Convention implements the principle that hostage taking is prohibited in all circumstances and that any person committing such an act shall be either prosecuted or extradited pursuant to article 8 of this Convention or the relevant provisions of the Geneva Conventions of 1949 or their Additional Protocols, without any exception whatsoever."[234]

(6) The same holds true for the interpretative declaration made by Turkey in respect of the 1976 Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques:

> "In the opinion of the Turkish Government the terms 'widespread', 'long-lasting' and 'severe effects' contained in the Convention need to be clearly defined. So long as this clarification is not made the Government of Turkey will be compelled to interpret itself the terms in question and consequently it reserves the right to do so as and when required."[235]

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[232] The declaration was confirmed upon ratification on 22 March 1974; see United Nations, *Treaty Series*, vol. 936, p. 419.

[233] *Multilateral Treaties* ..., chap. XXI.6.

[234] *Ibid.*, chap. XVIII.5.

[235] *Ibid.*, chap. XXVI.1.

(7) Conversely, a declaration such as the one made by the United States of America when signing the 1988 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution is clearly a simple interpretative declaration:

> "The Government of the United States of America understands that nations will have the flexibility to meet the overall requirements of the protocol through the most effective means."[236]

(8) It is in fact only rarely that the conditional nature of an interpretative declaration is clearly apparent from the wording used.[237] In such situations the distinction between "simple" and "conditional" interpretative declarations poses problems similar to those posed by the distinction between reservations and interpretative declarations, and these problems must be solved in accordance with the same principles.[238]

(9) Moreover, it is not uncommon for the true nature of interpretative declarations to become clear when they are contested by other contracting States or contracting organizations. This is demonstrated by some famous examples, such as the declaration that India attached to its instrument of ratification of the constituent instrument of the Inter-Governmental Maritime Consultative Organization (IMCO)[239] or Cambodia's declaration with regard to the same

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[236] *Ibid.*, chap. XXVII.1.

[237] Most often, the declaring State or international organization simply says that it "considers that ..." ("*considère que* ...") (for examples (of which there are a great many), see the declarations made by Brazil when signing the United Nations Convention on the Law of the Sea (*ibid.*, chap. XXI.6), the third declaration made by the European Community when signing the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (*ibid.*, chap. XXVII.4), or those made by Bulgaria to the Vienna Convention on Consular Relations of 1963 (*ibid.*, chap. III.6) or to the 1974 Convention on a Code of Conduct for Liner Conferences (*ibid.*, chap. XII.6)), "*estime que* ..." (see the declaration made by Sweden concerning the Convention establishing the International Maritime Organization (*ibid.*, chap. XII.1)), or "declares that ..." (see the second and third declarations made by France concerning the 1966 International Covenant on Economic, Social and Cultural Rights (*ibid.*, chap. IV.3)) or that made by the United Kingdom when signing the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (*ibid.*, chap. XXVII.3), or that it "interprets" a particular provision in a particular way (see the declarations made by Algeria or Belgium in respect of the International Covenant on Economic, Social and Cultural Rights (*ibid.*, chap. IV.3), the declaration made by Ireland in respect of article 31 of the 1954 Convention relating to the Status of Stateless Persons (*ibid.*, chap. V.3) or the first declaration made by France when signing the 1992 Convention on Biological Diversity (*ibid.*, chap. XXVII.8)), or that, "according to its interpretation", a particular provision has a certain meaning (see the declarations by the Netherlands concerning the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects of 10 October 1980 (*ibid.*, chap. XXVI.2) or those made by Fiji, Kiribati, Nauru, Papua New Guinea and Tuvalu in respect of the 1992 United Nations Framework Convention on Climate Change (*ibid.*, chap. XXVII.7)) or that it "understands that ..." (see the declarations made by Brazil when ratifying the United Nations Convention on the Law of the Sea (*ibid.*, chap. XXI.6)).

[238] See guideline 1.3.1.

[239] The text of the declaration appears in *Multilateral Treaties* ..., chap. XII.1.

> "When the Secretary-General notified IMCO of the instrument of ratification of India subject to the declaration, it was suggested that in view of the condition which was 'in the nature of a reservation' the matter should be put before the IMCO Assembly. The Assembly resolved to have the declaration circulated to all IMCO members but until the matter had been decided, India was to participate in IMCO without vote. France and the Federal Republic of Germany lodged objections against the declaration made by India, France on the ground that India was asserting a unilateral right to interpret the Convention

Convention.[240] These precedents confirm that there is a discrepancy between some declarations, in which the State or international organization formulating them does no more than explain its interpretation of the treaty, and others in which the authors seek to impose their interpretation on the other contracting States or contracting organizations.

(10) This discrepancy is of great practical significance. Unlike reservations, simple interpretative declarations place no conditions on the expression by a State or international organization of its consent to be bound; they simply attempt to anticipate any dispute that may arise concerning the interpretation of the treaty. The declarant "sets a date", in a sense; it gives notice that, should a dispute arise, its interpretation will be such, but it does not make that point a condition for its participation in the treaty. Conversely, conditional declarations are closer to reservations in that they seek to produce a legal effect on the application of the provisions of the treaty, which the State or international organization accepts only on condition that the provisions are interpreted in a specific way.

(11) Case law reflects the ambivalent nature of conditional interpretative declarations:

- in the *Belilos* case, the European Court of Human Rights considered the validity of Switzerland's interpretative declaration from the standpoint of the rules applicable to reservations, without assimilating one to the other;[241]

> and Germany on the ground that India might in the future take measures that would be contrary to the Convention.
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> "In resolution 1452 (XIV) adopted on 7 December 1959, the General Assembly of the United Nations, noting the statement made on behalf of India at the 614th meeting of the Sixth Committee (Legal) explaining that the Indian declaration on IMCO was a declaration of policy and that it did not constitute a reservation, expressed the hope 'that, in the light of the above-mentioned statement of India an appropriate solution may be reached in the Inter-Governmental Maritime Consultative Organization at an early date to regularize the position of India'.
>
> "In a resolution adopted on 1 March 1960, the Council of the Inter-Governmental Maritime Consultative Organization, taking note of the statement made on behalf of India referred to in the foregoing resolution and noting, therefore, that the declaration of India has no legal effect with regard to the interpretation of the Convention 'considers India to be a member of the Organization'." (India's reply to the International Law Commission questionnaire on reservations to treaties.)

With regard to this episode, see in particular D.M. McRae, footnote 129 above, pp. 163–165; F. Horn, footnote 25 above, pp. 301–302; R. Sapienza, footnote 129 above, pp. 108–113.

[240] The text appears in *Multilateral Treaties* ..., chap. XII.1. Several Governments stated "that they assumed that it was a declaration of policy and did not constitute a reservation; and that it had no legal effect with regard to the interpretation of the Convention". Accordingly, "[i]n a communication addressed to the Secretary-General on 31 January 1962, the Government of Cambodia stated that '... the Royal Government agrees that the first part of the declaration which it made at the time of the acceptance of the Convention is of a political nature. It therefore has no legal effect regarding the interpretation of the Convention. The statements contained [in the second part of the declaration?], on the other hand, constitute a reservation to the Convention by the Royal Government of Cambodia'" (*ibid.*, note 17). With regard to this episode, see in particular D.M. McRae, footnote 129 above, pp. 165–166; R. Sapienza, footnote 129 above, pp. 177–178.

[241] Although it did not formally reclassify Switzerland as a reservation, the Court examined "the validity of the interpretative declaration in question, *as in the case of a reservation*" (Judgement of 21 May 1988, *Publications of the European Court of Human Rights*, Series A., vol. 132, para. 49, p. 21). In the *Temeltasch* case, the European Commission of Human Rights was less cautious: completely (and intentionally) adhering to Professor McRae's position (footnote 231 above), it "assimilated" the notions of conditional interpretative declarations and reservations

- likewise, in a text that is admittedly rather obscure, the Arbitral Tribunal that settled the dispute between France and the United Kingdom concerning the continental shelf analysed the third reservation by France concerning article 6 of the 1958 Geneva Convention "as a particular condition posed by the French Republic for its acceptance of the delimitation system provided for in article 6", adding: "To judge by its terms, this condition would seem to go beyond a simple interpretation."[242] This would seem to establish *a contrario* that it could have been a conditional interpretative declaration and not a reservation in the strict sense of the term.

(12) The fact remains that, even if it cannot be entirely "assimilated" to a reservation, a conditional interpretative declaration does come quite close, for as Paul Reuter has written: "*[l']essence de la 'réserve' est de poser une* condition*: l'État ne s'engage qu'à la condition que certains effets juridiques du traité ne lui soient pas appliqués, que ce soit par l'exclusion ou la modification d'une règle ou par l'interprétation de celle-ci*" ("the essence of 'reservations' is to stipulate a condition: the State will commit itself only on condition that certain legal effects of the treaty are not applied to it, either by excluding or modifying a rule or by interpreting it").[243] There is support for this position in doctrine.[244]

(13) It follows that, as the Commission noted following detailed consideration of the matter, while conditional interpretative declarations do not have the same definition as reservations, they are subject to the same rules of form and substance as those applying to reservations. This is stated in the second paragraph of guideline 1.4. Consequently, it is unnecessary to mention conditional interpretative declarations in the remainder of this Guide: the legal regime of reservations is applicable to them.

(14) The Commission considered whether, instead of reproducing the long list of times at which a reservation (and, by extension, a conditional interpretative declaration) may be formulated, as in guideline 1.1, it might not be simpler and more elegant to use a general phrase such as "at the time of expression of consent to be bound". It does not seem possible to adopt this solution, however, since interpretative declarations, like reservations, may be formulated at the time of signature, even in the case of treaties in solemn form. In this case, however, and just as for reservations, conditional interpretative declarations must be confirmed at the time of expression of consent to be bound. There would appear to be no logical reason for a different solution as between reservations and conditional interpretative declarations to which the other States and international organizations must be in a position to react where necessary. Moreover, it will be noted that, in general, States wishing to make their participation in a treaty subject to a specified interpretation of the treaty generally confirm their interpretation at the time of expression of consent to be bound, when it has been formulated at the time of signature or at any earlier point in the negotiations.[245]

(decision of 5 May 1982, *Decisions and Reports*, April 1983, pp. 130–131).

[242] Decision of 30 June 1977, footnote 24 above, *R.I.A.A.*, vol. XVIII, para. 55, p. 169.

[243] P. Reuter, footnote 28 above, p. 71. The inherent conditional character of reservations is stressed in numerous doctrinal definitions, including that of the Harvard Law School (Research in International Law of the Harvard Law School, "Draft Convention on the Law of Treaties", *A.J.I.L.* 1935, supplement No. 4, p. 843; see also F. Horn, footnote 25 above, p. 35 and the examples cited). The definition proposed by Sir Humphrey Waldock in 1962 also specifically included conditionality as an element in the definition of reservations (see *Yearbook ... 1962*, vol. II, A/CN.4/144, p. 31); it was subsequently abandoned under circumstances that are not clear.

[244] See D.M. McRae, footnote 129 above, p. 172.

[245] Cf. the confirmation by the Federal Republic of Germany and the United Kingdom of their declarations formulated upon signing the Basel Convention of 1989 on the Control of

1.5 Unilateral statements other than reservations and interpretative declarations

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations (including conditional interpretative declarations) are outside the scope of the present Guide to Practice.

Commentary

(1) Guideline 1.5 may be regarded as a "general exclusionary clause" purporting to limit the scope of the Guide to Practice to reservations, on the one hand, and to interpretative declarations *stricto sensu* (whether "simple" or "conditional"[246]), to the exclusion of other unilateral statements of any kind which are formulated in relation to a treaty, but which generally do not have as close a relationship with the treaty.

(2) As practice indicates, States and international organizations often take the opportunity, when signing or expressing their consent to be bound by a treaty, to make statements which relate to the treaty but seek neither to exclude or modify the legal effect of certain of its provisions (or of the treaty as a whole with respect to certain specific aspects) in their application to their author nor to interpret the treaty, and which are thus neither reservations nor interpretative declarations, whether "simple" or conditional.

(3) The United Nations online publication "*Multilateral treaties deposited with the Secretary-General*" contains numerous examples of such statements, concerning the legal nature of which the Secretary-General takes no position.[247] Instead, he simply notes that they have been made and leaves their legal assessment — an extremely important operation, as it determines the legal regime applicable to them — to the user.

(4) This publication reproduces only those unilateral statements which are formulated when signing or expressing consent to be bound, ratifying, etc., a treaty deposited with the Secretary-General, but which may in fact be neither reservations nor interpretative declarations. This is obviously because these are the only statements communicated to the Secretary-General, but there is no doubt that this fact is of major practical importance: statements made in the above circumstances raise the most problems as far as distinguishing them from reservations or conditional interpretative declarations is concerned, since *by definition* they may be formulated only "when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty".[248]

Transboundary Movements of Hazardous Wastes and their Disposal (see *Multilateral Treaties ...*, chap. XXVII.3); see also the practice followed by Monaco upon signing and then ratifying the 1966 Covenant on Civil and Political Rights (*ibid.*, chap. IV.4); by Austria in the case of the European Convention of 6 May 1959 on the Protection of the Archaeological Heritage (http://conventions.coe.int/treaty/EN/cadreprincipal.htm) or the European Community in regard to the 1991 Espoo Convention (*Multilateral Treaties ...*, chap. XXVII.4). See also the declarations by Italy or the United Kingdom concerning the 1992 Rio Convention on Biological Diversity (*ibid.*, chap. XXVII.8).

[246] On this distinction, see guideline 1.4.

[247] As attested by the wording of the heading introducing these instruments: "Declarations [with no other indication] and Reservations".

[248] See guidelines 1.1 and 1.4. On the other hand, "simple" interpretative declarations may, in the Commission's view, be formulated at any time; see guideline 1.2 and paras. (21) to (32) of the commentary thereto.

(5) However, although it is true that in practice most of these statements are made at the time of signature or of expression of consent to be bound by the treaty, it is nevertheless possible for them to be made at a different time, even after the entry into force of the treaty for their author. However, it would not be useful for the Commission to take a firm position on this point, as the purpose of guideline 1.5 is precisely to exclude such statements from the scope of the Guide to Practice.

(6) Similarly, and for the same reason, although it might seem *prima facie* that such unilateral statements fall within the general category of unilateral acts of States,[249] the Commission does not intend to take any decision regarding the legal regime applicable to them. It has simply endeavoured, in each of the guidelines in this section of the Guide to Practice, to provide, in as legally neutral a manner as possible, a definition of these different categories of unilateral statements which is sufficient to help distinguish them from reservations and interpretative declarations.

(7) Unilateral statements formulated by States or international organizations in respect of or in relation to a treaty are so numerous and so diverse that it is probably futile to try to make an exhaustive listing of them, and this section does not attempt to do so. The Commission has identified a number of such statements but has drawn up specific guidelines only for those statements that are of the greatest practical importance owing to the frequency with which they are made or the risk of their being confused with reservations or interpretative declarations. The classification contained in the guidelines below is, accordingly, merely illustrative.

(8) On the other hand, the Commission considered it unnecessary to draw up specific guidelines for other statements that are less frequently made or present only a slight risk of being confused with reservations or interpretative declarations. Such is the case for:

- "extensive" statements or statements purporting to undertake unilateral commitments;
- unilateral statements purporting to add further elements to a treaty;
- statements concerning the territorial application of a treaty; or
- general statements of policy.

However, statements of non-recognition, statements concerning modalities of implementation of a treaty at the internal level and unilateral statements made under an optional clause are covered by specific guidelines,[250] but this differential treatment in the Guide to Practice has no special meaning insofar as their nature or legal status are concerned.

"Extensive" statements or statements purporting to undertake unilateral commitments

(9) A well-known example of an "extensive" reservation that was given by Brierly in his first report on the law of treaties is provided by the statement which South Africa made when it signed the General Agreement on Tariffs and Trade (GATT) in 1948: "As the article reserved against stipulates that the agreement 'shall not apply' as between parties which have not concluded tariff negotiations with each other and which do not consent to its application, the effect of the reservation is to enlarge rather than restrict the obligations of South Africa."[251] Manfred Lachs also relied on that example in asserting the existence of cases

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[249] See the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, *Official Records of the General Assembly, Sixty-first Session, Supplement No 10* (A/61/10), pp. 367–381.

[250] Guidelines 1.5.1, 1.5.2 and 1.5.3, respectively.

[251] *Yearbook ... 1950*, vol. II, p. 239.

"where a reservation, instead of restricting, extended the obligations assumed by the party" in question.[252]

(10) The South African statement gave rise to considerable controversy,[253] but can hardly be regarded as a reservation: this kind of statement cannot have the effect of modifying the legal effect of the treaty or of some of its provisions. Admittedly, they are undertakings that were entered into at the time of expression of consent to be bound by the treaty but have no effect on the treaty, and could have been formulated at any time without resulting in a modification of their legal effects. In other words, it may be considered that whereas reservations are "non-autonomous unilateral acts",[254] such statements impose autonomous obligations on their authors and constitute unilateral legal acts which are subject to the legal rules applicable to that type of instrument[255] and not to the regime of reservations.

Unilateral statements purporting to add further elements to a treaty

(11) The same holds true for unilateral statements purporting to add further elements to a treaty. There is in fact nothing to prevent a party to a treaty from proposing an extension of the scope or purpose of the treaty to its partners. In the Commission's view, this is how the statement whereby the Government of Israel made known its wish to add the Shield of David to the Red Cross emblems recognized by the Geneva Conventions of 1949 may be seen.[256] Such a statement actually seeks not to exclude or modify the effect of the provisions of the treaties in question (which in fact remain unchanged), but to add a provision to those treaties.

(12) While such statements are relatively uncommon, they nevertheless do occur. Apart from the example of the statement by Israel adding the Shield of David to the list of Red Cross emblems,[257] one can think of cases of unilateral statements which are submitted as

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[252] *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 142. See also M.E. Villiger, footnote 49 above, p. 89, para. 36.

[253] James Brierly, in keeping with his general definition of reservations, regarded it as a "proposal of reservation", since it involved an "offer" made to the other parties which they had to accept for it to become a valid reservation (*Yearbook ... 1950*, vol. II, p. 239); Lachs regarded it purely and simply as an example of an extensive reservation (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 142); Horn saw it as a mere declaration of intent without any legal significance (F. Horn, footnote 25 above, p. 89); and Imbert considered that "the statement of the South African Union could only have the effect of increasing the obligations of that State. Accordingly, it did not constitute a reservation, which would necessarily restrict the obligations under the treaty" footnote 25 above, p. 15.

[254] On this concept, see Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public* (Nguyen Quoc Dinh), (Paris, L.G.D.J., 2009), 8th ed., 2009, pp. 398–400.

[255] In this connection, see J.M. Ruda, footnote 56 above, p. 147. See also the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, footnote 250 above, pp. 367–381.

[256] Legal scholars are divided on this point. Compare Jean Pictet, *Les Conventions de Genève du 12 août 1949 – Commentaire*, ICRC, Geneva, vol. I, pp. 330–341, or F. Horn, footnote 25 above, pp. 82–83 (who doubt whether it is a reservation), and Shabtai Rosenne, "The Red Cross, Red Crescent, Red Lion and Sun and the Red Shield of David", *Israel Yearbook on Human Rights*, 1975, pp. 9–54, or P.-H. Imbert, footnote 25 above, pp. 361–362 (who take the contrary view).

[257] See *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. I, Federal Political Department, Berne, p. 348. Turkey had proceeded in the same way to have the Red Crescent accepted among the Red Cross emblems under The Hague Conventions (see *Conférence internationale de la Paix, La Haye, 18 mai–29 juillet 1899*) (New edition, The Hague, Ministry of Foreign Affairs and Martinus Nijhoff, 1907) Part I, Annex, pp. 16–18; Part III, pp. 4–6, 54–55 and 59–60; *Actes de la Conférence de Révision réunie à Genève du 11 juin au 6 juillet 1906*, pp. 17, 63, 160–163, 175, 260, 271, 286 and 292; *Deuxième Conférence internationale de la Paix, La Haye, 15 juin–18 octobre 1907, Actes et Documents* (The Hague, Ministry of Foreign Affairs,

reservations but which, instead of limiting themselves to excluding (negatively) the legal effect of certain treaty provisions, actually seek to increase (positively) the obligations of other contracting States or contracting organizations as compared with those arising for them under general international law.[258] Since they are neither reservations nor "simple" or "conditional" interpretative declarations within the meaning of the present Guide to Practice, such unilateral statements fall outside its scope.

Statements concerning the territorial application of a treaty

(13) Some States also formulate statements concerning the territorial application of a treaty in order to prevent the treaty being applied to a territory for which the author of the statement is the international representative[259] or to extend the treaty's application to territories to which it did not previously apply, whether because of a statement having been made to that effect or implicitly.[260] While statements of territorial exclusion may initially appear to be similar to reservations *ratione loci*, they serve as the expression of a "different intention" within the meaning of article 29 of the Vienna Conventions; the State does not purport to exclude application of the treaty but is establishing the scope of its application *ratione loci* by defining what is meant by "its entire territory" within the meaning of article 29.[261] Similarly, statements and notifications of extension of territorial application do not constitute reservations or interpretative declarations within the meaning of the present Guide to Practice; their authors do not purport to limit application of the treaty or to interpret its terms, but rather to extend its application to a territory to which the treaty did not previously apply. A notification of territorial extension therefore appears to be an expression of consent to be bound by the treaty with respect to a given territory. There is nothing to prevent a State from accompanying a notification of territorial extension with true reservations applying to the territory in question.[262]

General statements of policy

(14) It also frequently happens that, on the occasion of the signing of a treaty or the expression of its consent to be bound, a State expresses its opinion, positive or negative, with regard to the treaty and even sets forth improvements that it feels ought to be made to the

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1907, 3 volumes, vol. I, *Séances plénières de la Conférence*, pp. 66–68, 659–660 and 722; vol. III, *Deuxième, Troisième et Quatrième Commissions*, pp. 292, 296–299 and 556–559).

[258] This would be the case with the "reservations" of the socialist countries to article 9 of the 1958 Convention on the High Seas mentioned in the commentary to guideline 1.1.1 (paras. (9) and (10) and footnote 61), considering that the scope given by those countries to State vessels on the high seas went further than that recognized by the applicable customary rules.

[259] See, for example, the practice of New Zealand concerning Tokelau (*Multilateral Treaties ...*, Historical Information (New Zealand), and the declarations of territorial exclusion made in relation to the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality, *ibid.*, chap. III.4; and in relation to the Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality, *ibid.*, chap. III.7); see also the practice of the United Kingdom concerning a number of its territories (for example, the territorial exclusion in respect of the Isle of Man resulting implicitly from the notification of the application of the Convention on the Rights of the Child to that territory (and others), *ibid.*, chap. IV.11) and the complex practice of China with regard to the territories of Hong Kong and Macao (*ibid.*, Historical Information (China)).

[260] See, among many examples, the declaration of territorial extension made by the United Kingdom in relation to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*ibid.*, chap. IV.9) and the Convention on the Rights of the Child (*ibid.*, chap. IV.11).

[261] See also paras. (5) to (10) of the commentary to guideline 1.1.3.

[262] See guideline 1.1.4 and commentary thereto.

treaty, as well as ways of making them, without purporting to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application between it and the other contracting States or contracting organizations, or to interpret it. Hence, these are neither reservations nor interpretative declarations, but simple general statements of policy formulated in relation to the treaty or relating to the area which it covers.

(15) Declarations by several States regarding the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons afford some notable examples.[263] These are simple observations regarding the treaty which reaffirm or supplement some of the positions taken during its negotiation, but which have no effect on its application.[264]

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[263] This is the case, for example, with the declarations formulated by China ("1. The Government of the People's Republic of China has decided to sign the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects adopted at the United Nations Conference held in Geneva on 10 October 1980. 2. The Government of the People's Republic of China deems that the basic spirit of the Convention reflects the reasonable demand and good intention of numerous countries and peoples of the world regarding prohibitions or restrictions on the use of certain conventional weapons which are excessively injurious or have indiscriminate effects. This basic spirit conforms to China's consistent position and serves the interest of opposing aggression and maintaining peace. 3. However, it should be pointed out that the Convention fails to provide for supervision or verification of any violation of its clauses, thus weakening its binding force. The Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices fails to lay down strict restrictions on the use of such weapons by the aggressor on the territory of his victim and to provide adequately for the right of a State victim of an aggression to defend itself by all necessary means. The Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons does not stipulate restrictions on the use of such weapons against combat personnel. Furthermore, the Chinese texts of the Convention and Protocol are not accurate or satisfactory enough. It is the hope of the Chinese Government that these inadequacies can be remedied in due course.") or by France ("After signing the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, the French Government, as it has already had occasion to state, through its representative to the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons in Geneva, during the discussion of the proposal concerning verification arrangements submitted by the delegation of the Federal Republic of Germany and of which the French Government became a sponsor, and at the final meeting on 10 October 1980; on 20 November 1980 through the representative of the Netherlands, speaking on behalf of the nine States members of the European Community in the First Committee of the thirty-fifth session of the United Nations General Assembly; regrets that thus far it has not been possible for the States which participated in the negotiation of the Convention to reach agreement on the provisions concerning the verification of facts which might be alleged and which might constitute violations of the undertakings subscribed to. It therefore reserves the right to submit, possibly in association with other States, proposals aimed at filling the gap at the first conference to be held pursuant to article 8 of the Convention and to utilize, as appropriate, procedures that would make it possible to bring before the international community facts and information which, if verified, could constitute violations of the provisions of the Convention and the Protocols annexed thereto.") (*Multilateral Treaties* ..., chap. XXVI.2; see also the declarations made by the United States of America, Italy and Romania (*ibid.*)).

[264] See also, for example, the long declaration made by the Holy See in 1985 when ratifying the two Additional Protocols of 1977 to the Geneva Conventions of 1949 (text attached to the reply from the Holy See to the Commission's questionnaire on reservations to treaties).

(16) This is also the case when a State makes a declaration in which it calls on all or some other States to become parties to a treaty[265] or to implement it effectively.[266]

(17) The same is true when a State takes the opportunity afforded by its signature of a treaty or its expression of consent to be bound by it to recall certain aspects of its policy with regard to the subject area of the treaty, as China did when it signed the Comprehensive Nuclear-Test-Ban Treaty adopted by the United Nations General Assembly on 10 September 1996[267] or the Holy See when it became a party to the Convention on the Rights of the Child.[268]

(18) In the same spirit, some declarations made in the instruments of ratification of the 1971 Seabed Treaty, notably those of Canada and India, concerning types of weapons other than nuclear weapons, do not purport to modify the rights and obligations ensuing from the Treaty or to interpret it; as was noted, "Their main purpose is to avoid that the Treaty prejudice the positions of States making a declaration with respect to certain issues of the law of the sea on which States have different positions and views".[269]

(19) What the diverse declarations analysed briefly above have in common is that the treaty in respect of which they are made is simply an occasion, and they bear no legal relationship to it: they could have been made under any circumstances, they have no effect on the treaty's implementation, nor do they seek to. They are thus neither reservations nor interpretative declarations. What is more, they are not even governed by the law of treaties, which in turn offers no help in assessing their validity (which is dependent on other rules of international law, both general and specialized), and this justifies the fact that they, like the other categories of unilateral declarations defined in section 1.5, are excluded from the latter's scope.

1.5.1 Statements of non-recognition

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

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[265] See the declaration by the United States of America concerning the above-mentioned Convention of 10 October 1980: "The United States Government welcomes the adoption of this Convention, and hopes that all States will give the most serious consideration to ratification or accession" (*Multilateral Treaties* ..., chap. XXVI.2) or the one by Japan concerning the NTP: "The Government of Japan hopes that as many States as possible, whether possessing a nuclear explosive capability or not, will become parties to this Treaty in order to make it truly effective. In particular, it strongly hopes that the Republic of France and the People's Republic of China, which possess nuclear weapons but are not parties to this Treaty, will accede thereto" (United Nations, *Treaty Series*, vol. 1035, pp. 342–343).

[266] See the declaration by China concerning the Paris Convention of 13 January 1993 on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons: "III. States Parties that have abandoned chemical weapons on the territories of other States Parties should implement in earnest the relevant provisions of the Convention and undertake the obligation to destroy the abandoned chemical weapons" (*Multilateral Treaties* ..., chap. XXVI.3, pp. 890–891).

[267] "1. China has all along stood for the complete prohibition and thorough destruction of nuclear weapons and the realization of a nuclear-weapon-free world ..." (*ibid.*, chap. XXVI.4).

[268] "By acceding to the Convention on the Rights of the Child, the Holy See intends to give renewed expression to its constant concern for the well-being of children and families ..." (*ibid.*, chap. IV.11); see also the aforementioned declaration (footnote 264 above) by the Holy See on the subject of the 1977 Additional Protocols to the 1949 Geneva Conventions: "Finally, the Holy See reasserts, on this occasion, its strong conviction as to the fundamentally inhumane nature of war ...".

[269] L. Migliorino, footnote 149 above, p. 107; see also pp. 115 ff. and p. 119.

Commentary

(1) States frequently accompany the expression of their consent to be bound by a treaty with a statement in which they indicate that such consent does not imply recognition of one or more of the other contracting States or, in a more limited way, of certain situations, generally territorial, relating to one or more of the other parties. Such statements are often called "reservations relating to non-recognition"; this is a convenient but misleading heading that covers some very diverse situations.

(2) The term in fact applies to two types of statements which have the common feature of specifying that the State formulating them does not recognize another entity that is (or wishes to become) a party to the treaty, but which seek to produce very different legal effects: in some cases, the author of the statement is simply taking a "precautionary step" by pointing out that, in accordance with a well-established practice, its participation in a treaty to which an entity that it does not recognize as a State is a party does not amount to recognition; in other cases, the State making the statement expressly excludes the application of the treaty between itself and the non-recognized entity.

(3) In this regard, we may, for example, compare the reactions of Australia and the Federal Republic of Germany to the accession of certain States to the 1949 Geneva Conventions. While repeating its non-recognition of the German Democratic Republic, the Democratic People's Republic of Korea, Viet Nam and the People's Republic of China, Australia nevertheless "notes their acceptance of the provisions of the Conventions and their intention to apply the said provisions".[270] The Federal Republic of Germany, however, excludes any treaty relations with South Viet Nam:

> "... the Federal Government does not recognize the Provisional Revolutionary Government as a body empowered to represent a State and [...] accordingly is not able to consider the Provisional Revolutionary Government as a Party to the Geneva Conventions of 12 August 1949".[271]

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[270] See International Committee of the Red Cross (ICRC), Geneva Conventions of 12 August 1949 for the Protection of War Victims – Reservations, declarations and communications made at the time of or in connection with ratification, accession or succession (DOM/JUR/91/1719-CRV/1), p. 13; see also, for example, the statement of the Syrian Arab Republic at the time of signature of the Agreement establishing the International Fund for Agricultural Development (IFAD): "It is understood that the ratification of this Agreement by the Syrian Arab Republic does not mean in any way recognition of Israel by the Syrian Arab Republic" (*Multilateral Treaties ...*, chap. X.8), or the Syrian Arab Republic's first, albeit slightly more ambiguous, statement in respect of the Vienna Convention on Diplomatic Relations (*ibid.*, chap. III.3): "The Syrian Arab Republic does not recognize Israel and will not enter into dealings with it." The statement made by Argentina on acceding to the Convention relating to the Status of Stateless Persons of 28 September 1954 is not in the least ambiguous: "The application of this Convention in territories whose sovereignty is the subject of discussion between two or more States, irrespective of whether they are parties to the Convention, cannot be construed as an alteration, renunciation or relinquishment of the position previously maintained by each of them" (*ibid.*, chap. V.3); this is an example of non-recognition of a situation (see also Spain's statements concerning the 1958 Geneva Conventions on the Law of the Sea in respect of Gibraltar, *ibid.*, chaps. XXI.1, XXI.2, XXI.3 and XXI.4).

[271] ICRC document DOM/JUR/91/1719-CRV/1, footnote 270 above, p. 6. See also the statement by the Kingdom of Saudi Arabia on signing the Agreement establishing IFAD: "The participation of

(4) In the first case, there can be no doubt that the statements in question are not reservations. They add nothing to existing law, since it is generally accepted that participation in the same multilateral treaty does not signify mutual recognition, even implicit.[272] Even if that were not the case,[273] it would still not mean that the statements were reservations: these unilateral statements do not purport to have an effect on the treaty or on its provisions.

(5) Categorizing a unilateral statement whereby a State expressly excludes the application of the treaty between itself and the entity it does not recognize is an infinitely more delicate matter. Unlike "precautionary" statements, a statement of this type clearly purports to have (and does have) a legal effect on the application of the treaty, which is entirely excluded, but only in the relations between the declaring State and the non-recognized entity. Now, the definition of reservations does not preclude a reservation from having an effect *ratione personae*;[274] moreover, in accordance with the provisions of article 20, paragraph 4 (b), of the Vienna Convention of 1969, through an objection, accompanied by a clearly worded refusal to be bound by the treaty with respect to the reserving State, an objecting State can prevent the entry into force of the treaty as between itself and the reserving State.

(6) However, according to most legal writers, "[i]t is questionable whether a statement on this subject, even when designated as a reservation, constitutes a reservation as generally understood since it does not purport, in the usual circumstances, to amend or modify any substantive provision of the treaty".[275]

(7) There are several reasons for not categorizing a statement of non-recognition as a reservation, even if it purports to exclude the application of the treaty in the relations between the State formulating it and the non-recognized entity. These reasons are both practical and theoretical.

(8) In practice, it seems to be actually very difficult, if not impossible, to apply the reservations regime to statements of non-recognition:

- Objections to such statements are hardly likely to be made and would, in any event, be incapable of having any real effect;
- It would hardly be reasonable to conclude that such statements are prohibited under article 19 (a) and (b) of the 1969 and 1986 Conventions if the treaty in question prohibits, or permits only certain types of, reservations; and

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the Kingdom of Saudi Arabia in the Agreement shall in no way imply recognition of Israel and shall not lead to entry into dealings with Israel under this Agreement" (*Multilateral Treaties* ..., chap. X.8); see also the statements of Iraq and Kuwait, couched in similar terms, *ibid.*

[272] See Joe Verhoeven, *La reconnaissance internationale dans la pratique contemporaine* (Paris, Pedone, 1975), pp. 429–431. Kuwait clearly reaffirms this in the statement which it made on acceding to the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid: "It is understood that the accession of the State of Kuwait to the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the United Nations General Assembly [on 30 November 1973], does not mean in any way recognition of Israel by the State of Kuwait" (*Multilateral Treaties* ..., chap. IV.7).

[273] That is, if participation in the same multilateral treaty did imply mutual recognition.

[274] See, however, F. Horn, footnote 25 above, p. 109.

[275] M.M. Whiteman, footnote 25 above, p. 158; it should be recalled that, according to the definition given in guideline 1.1, a reservation purports to modify not the provisions of the treaty, but their effects. See also B.R. Bot, *Non-Recognition and Treaty Relations* (Leyden, Sijthoff, 1968), pp. 30–31, 132–139 and 252–254; M. Lachs, "Recognition and Modern Methods of International Cooperation", *British Year Book of International Law*, 1959, pp. 252–259; H. Lauterpacht, *Recognition in International Law* (Cambridge, Cambridge University Press, 1947), pp. 369–374 or J. Verhoeven, footnote 272 above, pp. 428–448.

- It must be acknowledged that recognizing them as reservations would hardly be compatible with the letter of the Vienna definition, since the cases in which such statements may be made cannot be limited to those covered by article 2, paragraph 1 (d), of the 1969 Convention.

(9) Moreover, from a more theoretical point of view, statements of this kind, unlike reservations, do not concern the legal effect of the treaty itself or its provisions, but rather the capacity of the non-recognized entity to be bound by the treaty.[276]

(10) Such statements are also not interpretative declarations since their aim is not to *interpret* the treaty but to exclude its application in the relations between two parties thereto.

(11) The Commission intentionally avoided specifying the nature of the non-recognized entity. Whether it is a State, a Government or any other entity (a national liberation movement, for example), the problem is posed in identical terms. *Mutatis mutandis*, the same holds true for statements concerning the non-recognition of certain situations (in particular territorial ones). In all these cases, the two categories of statements of non-recognition referred to above[277] — "precautionary statements"[278] and "statements of exclusion"[279] — can be found.

(12) The problem appears to be a marginal one insofar as international organizations are concerned; it could, however, arise in the case of some international integration organizations such as the European Union. In that event, there would be no reason not to extend the solution adopted for statements by States, *mutatis mutandis*, to statements which international organizations might be required to formulate. The Commission nevertheless feels that this possibility is too hypothetical at present to warrant making a specific reference to it in guideline 1.5.1.

(13) In adopting guideline 1.5.1, the Commission was guided by the fundamental consideration that the central problem here is that of non-recognition, which is peripheral to the right to enter reservations. The Commission felt that it was essential to mention this particular category of statements, which play a major role in contemporary international relations; as for all unilateral statements that are neither reservations nor interpretative declarations, however, it chose to focus on what it saw as strictly necessary to make a distinction between them and refrained from "spilling over" into issues relating to the recognition of States.

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[276] See J. Verhoeven, footnote 272 above, p. 431, footnote 284.

[277] See paras. (2) and (3) above.

[278] Cf. the statement by Cameroon concerning the Partial Nuclear Test-Ban Treaty of 5 August 1963: "Under no circumstances could the signing by the Federal Republic of Cameroon have the effect of entailing recognition by Cameroon of Governments or regimes which, prior to such signing, had not yet been recognized by the Federal Republic of Cameroon according to the normal traditional procedures established by international law." Similarly, see the statement by Benin in connection with the same treaty (*Status of Multilateral Arms Regulation and Disarmament Agreements*, Fifth Edition, 1996 (United Nations publication, Sales No. E.97.IX.3, p. 40)) or the one by the Republic of Korea when it signed the Convention on Biological Weapons (*ibid.*, p. 176).

[279] Cf. the statement by the United States concerning its participation in the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, signed in Geneva on 13 July 1931, which "does not involve any contractual obligation on the part of the United States of America to a country represented by a regime or entity which the Government of the United States of America does not recognize as the government of that country until such country has a Government recognized by the Government of the United States of America" (*Multilateral Treaties* ..., chap. VI.8).

1.5.2 Statements concerning modalities of implementation of a treaty at the internal level

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without affecting its rights and obligations towards the other contracting States or contracting organizations, is outside the scope of the present Guide to Practice.

Commentary

(1) "Informative declarations", whereby a State informs its partners, for example, of the internal authorities that will be responsible for implementing the treaty, regardless of how it will discharge its obligations or how it will exercise its rights under the treaty, are outside the scope of the present Guide to Practice.

(2) The practice of this type of unilateral declaration seems particularly developed in the United States of America, where three categories have been noted: "Statements initiated by the Senate may authorize the President to issue more concrete instructions for the implementation of the treaty obligations on the internal level or by means of agreements of a special kind with the other parties or they may let certain measures of implementation pend later authorization by Congress."[280]

(3) Thus, authorization to ratify the Statute of the International Atomic Energy Agency (IAEA) was given by the United States Senate:

> "subject to the interpretation and understanding which is hereby made a part and condition of the resolution of ratification, that (1) any amendment to the Statute shall be submitted to the Senate for its advice and consent, as in the case of the Statute itself, and (2) the United States will not remain a member of the Agency in the event of an amendment to the Statute being adopted to which the Senate by a formal vote shall refuse its advice and consent".[281]

(4) This declaration was attached to the United States instrument of ratification (the State party called it an "interpretation and understanding"), with the following explanation:

> "The Government of the United States of America considers that the above statement of interpretation and understanding pertains only to United States constitutional procedures and is of a purely domestic character."[282]

(5) As widespread as this practice is on the part of the United States, the latter is not the only country to use it. For example, in ratifying the United Nations Convention on the Law of the Sea, Greece declared that it:

> "secures all the rights and assumes all the obligations deriving from the Convention" and that
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> "[It] shall determine when and how it shall exercise these rights, according to its national strategy. This shall not imply that Greece renounces these rights in any way".[283]

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[280] F. Horn, footnote 25 above, p. 102.

[281] Text in M.M. Whiteman, footnote 25 above, p. 191; see also the "interpretation and explanation" attached to the instrument of ratification of the Convention establishing the Organization for Economic Cooperation and Development (OECD) (*ibid.*, p. 192).

[282] *Ibid.*, pp. 191–192.

[283] *Multilateral Treaties ...*, chap. XXI.6.

(6) Occasionally, however, the distinction between an informative declaration and an interpretative declaration may be unclear, as Sweden notes in its reply to the Commission's questionnaire on reservations:[284] "It should be noted that some of the declarations referred to include purely informative as well as interpretative elements. Only the latter are being dealt with here, although the distinction may sometimes be vague." By way of example, Sweden, explaining the reasons for the declaration attached to its instrument of ratification of the 1980 European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities, stated: "The reason for the declaration [...] was not only to provide information on which Swedish authorities and bodies would fall within the scope of the Convention, but also to convey that its application would be confined to those indicated; e.g. to exclude other bodies such as parishes which under Swedish law are local public entities." Here one can probably say that this is really a reservation by means of which the author purports to exclude the application of the treaty to certain types of institution to which it might otherwise apply. At the very least, it might be a simple interpretative declaration explaining how Sweden understands the treaty.

(7) This is not, however, the case with purely informative declarations, which, like those of the United States cited earlier,[285] do not purport to have any international effect and concern only relations between Congress and the President. The problem arose in connection with a declaration of this type made by the United States in respect of a treaty concluded with Canada in 1950 on the subject of the Niagara River. The Senate would only authorize ratification through a "reservation" that specifically identified the competent national authorities for the American side;[286] this reservation was transmitted to Canada, which accepted it, stating that it did so "because its provisions relate only to the internal application of the treaty within the United States and do not affect Canada's rights or obligations under the treaty".[287] Following an internal dispute, the District of Columbia Court of Appeal ruled, in a judgement dated 20 June 1957, that the "reservation" had not modified the treaty in any way and that, as it related only to the expression of purely domestic concerns, it did not constitute a true reservation in the sense of international law.[288] This reasoning is further upheld[289] by the fact that the declaration did not purport to produce any effect at the international level.

(8) For the same reasons, it would be difficult to call such a unilateral declaration "an interpretative declaration": it does not interpret one or more of the provisions of the treaty, but is directed only at the internal modalities of its implementation. It can also be seen from United States practice that such declarations are not systematically attached to the instrument

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[284] Reply to question 3.1.

[285] Paras. (2) to (4).

[286] This famous declaration is known as the "Niagara reservation"; see Louis Henkin, "The Treaty Makers and the Law Makers: The Niagara Reservation", *Columbia Law Review* 1956, pp. 1151–1182.

[287] Quoted by M.M. Whiteman, footnote 25 above, p. 168.

[288] *Power of Authority of the State of New York v. Federal Power Commission*, 247 F.2d 538-544 (D.C. Cir, 1957); for a fuller account of the case, see M.M. Whiteman, footnote 25 above, pp. 165–169; William W. Bishop, Jr., "Reservations to treaties", *Recueil des cours* ..., 1961-II, vol. 103, pp. 317–322; or F. Horn, footnote 25 above, pp. 107–108.

[289] The fact that the "Niagara reservation" was formulated in the context of a bilateral treaty does not weaken this reasoning; quite the contrary: while a "reservation" to a bilateral treaty can be viewed as an offer to renegotiate (see guideline 1.6.1), which, in this case, Canada accepted, it is quite significant that the Court of Appeals held that it had no international scope. It would in fact be difficult to see how Canada could have "objected" to a declaration that did not concern it.

by which the country expresses its consent to be bound by a treaty,[290] and this clearly demonstrates that they are exclusively domestic in scope.

(9) Accordingly, it would appear that declarations which simply give indications of the manner in which the State that formulates them will implement the treaty at the internal level are not interpretative declarations, even though they bear a definite relationship to the treaty.

(10) The above comments may also apply to certain unilateral declarations formulated by an international organization in relation to a treaty. For example, the European Community made the following declaration when depositing the instrument of approval of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005: "As regards the Community competences described in the Declaration pursuant to Article 27 (3) (c) of the Convention, the Community is bound by the Convention and will ensure its due implementation. It follows that the Member States of the Community which are party to the Convention in their mutual relations apply the provisions of the Convention in accordance with the Community's internal rules and without prejudice to appropriate amendments being made to these rules."[291]

(11) The Commission considers that the expression "at the internal level" is not excessive as regards unilateral declarations of this type formulated by international organizations, there no longer being any doubt as to the existence of an "internal" law peculiar to each international organization.[292]

(12) The words "without affecting" inserted in guideline 1.5.2 are intended to draw attention to the fact that States and international organizations which formulate unilateral declarations do not have the objective of affecting the rights and obligations of the declarant in relation to the other contracting States and contracting organizations, but that it cannot be excluded that those declarations may have such effects, in particular through estoppel or, more generally, owing to the application of the principle of good faith. Moreover, if, as is sometimes asserted, unilateral declarations made in respect of the manner in which their authors will implement

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[290] See D.H. Miller, footnote 26 above, pp. 170–171, or M.M. Whiteman, footnote 25 above, pp. 186 ff.

[291] See text of the declaration on the UNESCO website at the following address: http://portal.unesco.org/ en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html#RESERVES or in the *Official Journal of the European Communities*, OJ L 201 of 25.7.2006, pp. 15–30, Annex 2. Along the same lines, see the declaration made by the European Community when signing the Convention of 25 February 1991 on Environmental Impact Assessment in a Transboundary Context: "It is understood that the Community Member States, in their mutual relations, will apply the Convention in accordance with the Community's internal rules, including those of the EURATOM Treaty, and without prejudice to appropriate amendments being made to those rules" (*Multilateral Treaties* ..., chap. XXVII.4). See also similar declarations by the European Community in respect of the 1982 Convention on the Law of the Sea (*ibid.*, chap. XXI.6) and the United Nations Framework Convention on Climate Change (*ibid.*, chap. XXVII.7).

[292] See, for example, P. Reuter, "Principes de droit international public", *Recueil des cours* ..., 1961-II, vol. 103, particularly pp. 526–530; C.W. Jenks, *The Proper Law of International Organizations* (London, Stevens, 1962), 282 p.; P. Cahier, "Le droit interne des organisations internationales", *Revue générale de droit international public*, 1963, pp. 563–602; or G. Balladore-Pallieri, "Le droit interne des organisations internationales", *Recueil des cours* ..., 1969-II, vol. 127, pp. 1–138 or C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, 2005), pp. 15–45. See also the text of the draft articles on the responsibility of international organizations adopted by the Commission on second reading at its 2011 session, in particular, article 2, subparagraph (b), and paras. (16) to (19) of the commentary thereto, para. 88 of the present report.

their obligations under the treaty at the internal level may constitute genuine reservations (especially in the field of human rights), these declarations must clearly be treated as such; but this is true of all the unilateral declarations listed in this section.

1.5.3 Unilateral statements made under a clause providing for options

1. A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty permitting the parties to accept an obligation that is not otherwise imposed by the treaty, or permitting them to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

2. A restriction or condition contained in a statement by which a State or an international organization accepts, by virtue of a clause in a treaty, an obligation that is not otherwise imposed by the treaty does not constitute a reservation.

Commentary

(1) Paragraph 1 of guideline 1.5.3 covers two cases in which a statement is made under an express treaty provision that offers contracting States and contracting organizations an element of choice: the first concerns an optional clause that the author of the statement is free to choose or not, while the second involves a clause that permits the contracting State or contracting organization to accept only certain obligations[293] from among several specified in the treaty.

(2) The unilateral statements referred to in the first case covered by guideline 1.5.3 may seem similar to those mentioned in guideline 1.1.6 (which constitute reservations): *i.e.* statements made under a clause expressly authorizing the exclusion or the modification of certain provisions of a treaty. In both cases, the treaty expressly provides for such statements, which contracting States and contracting organizations are free to make in order to modify the obligations imposed on them by the treaty. However, they are also very different in nature: while statements made under an exclusionary clause (or an opting-out or contracting-out clause) purport to exclude or modify the legal effect of certain provisions of the treaty as they apply to their authors and must therefore be viewed as genuine reservations, those made under optional clauses have the effect of increasing the declarant's obligations beyond what is normally expected of the parties under the treaty and do not affect its entry into force in their case.

(3) The purpose of optional clauses or opting-in (or contracting-in) clauses, which may be defined as provisions stipulating that the parties to a treaty may accept obligations which, in the absence of explicit acceptance, would not be automatically applicable to them, is not to reduce, but to increase, the obligations arising from the treaty for the author of the unilateral statement.[294]

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[293] Or at least one of the treaty obligations.

[294] According to Michel Virally, these are clauses "to which the parties accede only through special acceptance as distinct from accession to the treaty as a whole" ("Des moyens utilisés dans la pratique pour limiter l'effet obligatoire des traités", in Université catholique de Louvain, quatrième colloque du Département des Droits de l'Homme, *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme* (Bruylant, Brussels, 1982), p. 13).

(4) The most famous optional clause is certainly Article 36, paragraph 2, of the Statute of the International Court of Justice,[295] but there are many others; such clauses are either drawn up on the same model and result in the acceptance of the competence of a certain mode of settlement of disputes or of monitoring by an organ created by the treaty, as contemplated in article 41, paragraph 1, of the 1966 International Covenant on Civil and Political Rights,[296] or are exclusively prescriptive in nature, as in the case, for example, of article 25 of the Hague Convention of 2 October 1973 on the recognition and enforcement of decisions relating to maintenance obligations.[297]

(5) Despite some academic opinions to the contrary,[298] statements made under such clauses actually have little in common at the technical level with reservations, apart from the (important) fact that they both purport to modify the application of the effects of the treaty, and it is quite clear that "opt-out clauses seem to be much closer to reservations than opt-in clauses".[299] Indeed, not only can

(a) Statements made under optional clauses be formulated, in most cases, at any time, but also,

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[295] "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. The interpretation of a treaty; b. Any question of international law; c. The existence of any fact which, if established, would constitute a breach of an international obligation; d. The nature or extent of the reparation to be made for the breach of an international obligation."

[296] "A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the [Human Rights] Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant ..."; see also the former articles 25 ("Acceptance of the right to address individual petitions to the Commission") and 46 ("Acceptance of inter-State declarations") of the European Convention for the Protection of Human Rights and Fundamental Freedoms (these articles have been modified, to provide for automatic compulsory jurisdiction, by articles 33 and 34 of Protocol No. 11 of 11 May 1994, and correspond to current article 34 of the Convention) or article 45, paragraph 1, of the American Convention on Human Rights: "Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention."

[297] "Any Contracting State may, at any time, declare that the provisions of this Convention will be extended, in relation to other States making a declaration under this article, to an offic[illegible] deed ('*acte authentique*') drawn up by or before an authority or public official and directly enforceable in the State of origin insofar as these provisions can be applied to such deeds"; see also articles 16 and 17, paragraph 2, of the Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters, or article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters, or article 4, paragraphs 2 and 4, of ILO Convention No. 118 of 1962 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security (see also the examples given in the memorandum from the ILO to the ICJ in 1951, in ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: Pleadings, oral arguments, documents*, p. 232, or again article 4, paragraph 2 (g), of the United Nations Framework Convention on Climate Change of 9 May 1992).

[298] See W.P. Gormley, footnote 115 above, pp. 68 and 75, and Part II, p. 450.

[299] S. Spiliopoulou Åkermark, footnote 101 above, pp. 479–514, especially p. 505.

(b) Optional clauses "start from a presumption that parties are not bound by anything other than what they have explicitly chosen",[300] while exclusionary clauses, like the mechanism for reservations, start from the opposite assumption; and

(c) Statements made under optional clauses purport not to "exclude or to modify the legal effect of certain provisions of [a] treaty in their application" to their author[301] or to limit the obligations imposed on [the author] by the treaty,[302] but, instead, to increase them, while the mere entry into force of the treaty for the author does not have this effect.

(6) Here again, to a certain degree, the complex problems associated with "extensive reservations"[303] arise. The only difference between these extensive reservations and those under consideration here is that the former are formulated solely on the initiative of the author, while the latter are made under a treaty.

(7) If the treaty so provides or, given the silence of the treaty, if it is not contrary to the object and purpose of the provision in question,[304] there is nothing to prevent such a statement, in turn, from being accompanied by restrictions aimed at limiting the legal effect of the obligation thereby accepted. This is the case with the "reservations" frequently made by States when they accept jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Court's Statute.[305]

(8) While no purpose would be served by deciding whether a distinction needs to be drawn between "reservations" and "conditions",[306] it is sufficient to state that:

> "These reservations have nothing in common with reservations encountered in multilateral treaties (…) Since the whole transaction of accepting the compulsory jurisdiction is *ex definitione* unilateral and individualized and devoid of any multilateral element or element of negotiation, the function of reservations in a declaration cannot be to exclude or vary the legal effect of some existing provision in relation to the State making the declaration. Their function, together with that of the declaration itself, is to define the terms on which that State unilaterally accepts the

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[300] *Ibid.*

[301] See guideline 1.1.

[302] See guideline 1.1.1.

[303] See paras. (9) and (10) of the commentary to guideline 1.5.

[304] In the *Loizidou v. Turkey* case, the European Court of Human Rights held that "having regard to the object and purpose of the [European] Convention [on Human Rights]", the consequences of restrictions on its competence "for the enforcement of the Convention and the achievement of its aims would be so far-reaching that a power to this effect should have been expressly provided for. However, no such provision exists in either article 25 or article 46" (on these provisions, see footnote 296 above) (judgment of 23 March 1995, para. 75, *R.U.D.H.* 1995, p. 139).

[305] Although the Statute is silent on the possibility of optional declarations under Article 36, paragraph 2, being accompanied by reservations other than the condition of reciprocity, this power, which is well established in practice and was confirmed by committee IV/I of the San Francisco Conference (cf. *UNCIO*, vol. 13, p. 39), is quite clear. Cf. Shabtai Rosenne, *The Law and Practice of the International Court*, 1920–2005, vol. II, *Jurisdiction*, 2006, pp. 737–744; see also the dissenting opinion of Judge Bedjaoui attached to the judgment of the ICJ of 4 December 1998 in the case concerning *Fisheries Jurisdiction (Spain v. Canada)*, para. 42, and the judgment of 21 June 2000 in the case concerning the *Aerial Incident of 10 August 1999 (Pakistan v. India)*, paras. 37–38.

[306] Shabtai Rosenne makes a distinction between these two concepts (*ibid.*, pp. 768–769).

> compulsory jurisdiction – to indicate the disputes which are included within that acceptance, in the language of the *Right of Passage* (Merits) case."[307]

(9) These observations are consistent with the jurisprudence of the International Court of Justice and, in particular, its judgment of 4 December 1998 in the *Fisheries Jurisdiction* case between Spain and Canada:

> "Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court. (...) All elements in a declaration under Article 36, paragraph 2, of the Statute which, read together, comprise the acceptance by the declarant State of the Court's jurisdiction are to be interpreted as a unity ..."[308]

(10) The same is true for the reservations which States attach to statements made under other optional clauses, such as those resulting from acceptance of the jurisdiction of the International Court of Justice under article 17 of the General Act of Arbitration, in respect of which the Court has stressed "the close and necessary link that always exists between a jurisdictional clause and reservations to it".[309]

(11) It is therefore impossible simply to equate reservations appearing in the unilateral statements by which a State or an international organization accepts a provision of a treaty under an optional clause with reservations to a multilateral treaty. It is undoubtedly true that their ultimate objective is to limit the legal effect of the provision which the author of the statement thereby recognizes as being applicable to it. However, the reservation in question cannot be separated from the statement and does not in itself constitute a unilateral statement.

(12) By means of the phrase "or permitting them to choose between two or more provisions of the treaty", guideline 1.5.3 also covers the separate case in which the treaty requires States to choose between certain of its provisions, on the understanding, as shown by the examples given below, that the expression "two or more provisions of the treaty" is taken to cover not only articles and subparagraphs, but also chapters, sections and parts of a treaty and even annexes forming an integral part of it.

(13) This case is expressly dealt with in article 17, paragraph 2, of the 1969 and 1986 Vienna Conventions. While paragraph 1 concerns the partial exclusion of the provisions of a treaty under an exclusionary clause, paragraph 2 relates to the conceptually different case in which the treaty contains a clause allowing a choice between several of its provisions:

> "The consent of a State [or an international organization] to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates."

(14) The commentary to this provision, reproduced without change by the Vienna Conference,[310] is concise but sufficiently clear about the case covered:

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[307] *Ibid.*, pp. 737–738. The passage in question from the judgment relating to the *Right of Passage over Indian Territory* case of 12 April 1960 appears on page 34 of *I.C.J. Reports 1960*.

[308] Paragraph 44. See also paragraph 47: "Therefore, declarations and reservations are to be read as a whole."

[309] Judgment of 19 December 1978 in the *Aegean Sea Continental Shelf* case, *I.C.J. Reports 1978*, p. 33, para. 79.

[310] See *Documents of the Conference* A/CONF.39/11/Add.2, footnote 54 above, reports of the Committee of the Whole, paras. 156–157, pp. 129–130.

> "Paragraph 2 takes account of a practice which is not very common but which is sometimes found, for example, in the General Act for the Pacific Settlement of International Disputes and in some international labour conventions. The treaty offers each State a choice between differing provisions of the treaty."[311]

(15) As has been noted,[312] it is not accurate (or, at all events, it is no longer accurate) to say that such a practice is, today, "not very common". It is actually fairly widespread, at least in the apparently rather vague sense given to it by the Commission in 1966, but this, in turn, includes two different hypotheses which do not fully overlap.

(16) The first is illustrated, for example, by the statements made under the 1928 General Act for Conciliation, Judicial Settlement and Arbitration, article 38, paragraph 1, of which provides:

> "Accessions to the present General Act may extend:
>
> A. Either to all the provisions of the Act (chapters I, II, III and IV);
>
> B. Or to those provisions only which relate to conciliation and judicial settlement (chapters I and II), together with the general provisions dealing with these procedures (Chapter IV)."[313]

The same is true of several International Labour Organization (ILO) conventions, in which this technique, often used subsequently,[314] was introduced by Convention No. 102 of 1952 concerning Minimum Standards of Social Security, article 2 of which provides:

> "Each Member for which this Convention is in force:
>
> (a) shall comply with:
>
> (i) Part I;
>
> (ii) at least three of Parts II, III, IV, V, VI, VII, VIII, IX and X, including at least one of Parts IV, V, VI, IX and X;
>
> (iii) the relevant provisions of Parts XI, XII and XIII; and
>
> (iv) Part XIV."

Along the same lines, mention may be made of the European Social Charter of 18 October 1961, article 20, paragraph 1, of which provides for a partially optional system of acceptance.[315]

> "Each of the Contracting Parties undertakes:
>
> (a) To consider part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that part;

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[311] *Yearbook ... 1966*, vol. II, p. 202, para. (3) of the commentary to article 14 (which became article 17 in 1969).

[312] S. Spiliopoulou Åkermark, footnote 101 above, p. 504.

[313] The Revised General Act of 1949 adds a third possibility: "C. Or to those provisions only which relate to conciliation (Chapter I), together with the general provisions concerning that procedure (Chapter IV)."

[314] See P.-H. Imbert, footnote 25 above, p. 172.

[315] Hans Wiebringhaus, "La Charte sociale européenne: vingt ans après la conclusion du Traité", A.F.D.I., 1982, p. 936.

> (b) To consider itself bound by at least five of the following articles of part II of this Charter: Articles 1, 5, 6, 12, 13, 16 and 19;
>
> (c) [...] to consider itself bound by such a number of articles or numbered paragraphs of part II of the Charter as it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than 10 articles or 45 numbered paragraphs."[316]

(17) The same is true of statements made under the second category of treaty clauses which, even more clearly, offer a choice between the provisions of a treaty because they oblige the parties to choose a given provision (or a given set of provisions) or, *alternatively*, another provision (or another set of provisions). The question is no longer one of choosing *among* the provisions of a treaty, but of choosing *between them*, on the understanding that, in contrast to the previous case, there can be no accumulation,[317] and the acceptance of a treaty is not partial (even if the obligations deriving from it may be more or less binding depending on the option selected).

(18) These "alternative clauses" are less common than those analysed above. They nevertheless exist, as demonstrated by, for example, article 2 of ILO Convention No. 96 (revised) of 1949 concerning Fee-Charging Employment Agencies:[318]

> "1. Each Member ratifying this Convention shall indicate in its instrument of ratification whether it accepts the provisions of part II of the Convention, providing for the progressive abolition of fee-charging employment agencies conducted with a view to profit and the regulation of other agencies, or the provisions of part III, providing for the regulation of fee-charging employment agencies including agencies conducted with a view to profit.
>
> 2. Any Member accepting the provisions of part III of the Convention may subsequently notify the Director General that it accepts the provisions of part II; as from the date of the registration of such notification by the Director General, the provisions of part III of the Convention shall cease to be applicable to the Members in question and the provisions of part II shall apply to it."[319]

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[316] This complex system was used again in article A, paragraph 1, of the revised Social Charter on 3 May 1996. See also articles 2 and 3 of the 1964 European Code of Social Security and article 2 of the European Charter for Regional or Minority Languages of 5 November 1992: "1. Each Party undertakes to apply the provisions of part II to all the regional or minority languages spoken within its territory and which comply with the definition in article 1. 2. In respect of each language specified at the time of ratification, acceptance or approval, in accordance with article 3, each Party undertakes to apply a minimum of thirty-five paragraphs or subparagraphs chosen from among the provisions of part III of the Charter, including at least three chosen from each of the articles 8 and 12 and one from each of the articles 9, 10, 11 and 13."

[317] Article 287 of the 1982 United Nations Convention on the Law of the Sea falls midway between the two approaches: States must choose one or more binding procedures for the settlement of disputes leading to binding decisions, failing which the arbitral procedure provided for in annex VII applies. But there may be an accumulation of different procedures.

[318] Imbert stresses that this is the best example of the type of clause allowing States to make a choice in the restrictive sense (footnote 25 above, p. 172); see also F. Horn, footnote 25 above, p. 134.

[319] See also section 1 of article XIV of the IMF Statutes (amended in 1976), whereby: "Each member shall notify the Fund whether it intends to avail itself of the transitional arrangements in section 2 of this article [Exchange restrictions], or whether it is prepared to accept the obligations of article VIII, sections 2, 3 and 4 [General obligations of member States]. A member availing itself of the transitional arrangements shall notify the Fund as soon thereafter as it is prepared to accept these obligations."

(19) As has been observed, "[o]ptional commitments ought to be distinguished from authorized reservations, although they in many respects resemble such reservations".[320] Moreover, the silence of article 17, paragraph 2, of the Vienna Conventions, which differs greatly from the reference in paragraph 1 to articles 19 to 23 on reservations,[321] constitutes, in contrast with unilateral statements made under an exclusionary clause, an indication of the clear dividing line between reservations and these alternative commitments.

(20) In the two forms which they may take, these statements are clearly alternatives to reservations in that they constitute procedures which modify the application of a treaty on the basis of the preferences of the parties (even if those preferences are strongly indicated in the treaty). In addition, like reservations, they take the form of unilateral statements made at the time of signature or of expression of consent to be bound (even if they may subsequently be modified, although, under certain conditions, reservations, too, may be modified).[322] And the fact that provision must be made for them in the treaty to which they apply does not constitute a factor differentiating them from reservations, since reservations may also be provided for in a restrictive way by a reservation clause.

(21) Yet there are striking differences between these statements and reservations, for, unlike a reservation, a statement made under a clause providing for options is the condition *sine qua non* of the participation of the author of the statement in the treaty, contrary to a statement made under the optional clause referred to in the first case mentioned in the guideline. Moreover, although they exclude the application of certain provisions of the treaty in respect of the State or international organization making the statement, such exclusion relates to the treaty itself and is inseparable from the entry into force of other provisions of the treaty in respect of the author of the same statement.

1.6 Unilateral statements in respect of bilateral treaties

Commentary

(1) The above guidelines seek to delimit as closely as possible the definition of reservations to multilateral treaties and other unilateral statements that are formulated in connection with a treaty and with which they may be compared, or even confused, including interpretative declarations. The Commission questioned whether it was possible to transpose these definitions to unilateral statements formulated in respect of bilateral treaties or at the time of their signature or of the expression of the consent of the parties to be bound. This is the subject matter of section 1.6 of the Guide to Practice.

(2) Strictly speaking, it would have been logical to include the definitions which appear in the guidelines hereafter respectively in section 1.5, insofar as guideline 1.6.1 is concerned (since the Commission considers that so-called "reservations" to bilateral treaties do not correspond to the definition of reservations), and in section 1.2, insofar as guidelines 1.6.2 and 1.6.3 are concerned (since they deal with genuine interpretative declarations). Given its particular nature, however, the Commission felt that the Guide would better serve its practical purpose if the guidelines devoted more specifically to unilateral statements formulated in respect of bilateral treaties were to be grouped in a single separate section.

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[320] F. Horn, footnote 25 above, p. 133.

[321] Cf. paras. (12) to (14) of the commentary to guideline 1.1.6.

[322] See guidelines 2.3.4 ("Widening of the scope of a reservation"), 2.5.10 ("Partial withdrawal of reservations") and 2.5.11 ("Effect of a partial withdrawal of a reservation"), and commentaries thereto.

(3) The Commission considers, moreover, that the guidelines on unilateral statements other than reservations and interpretative declarations, grouped in section 1.5, can be applied, where necessary, to those dealing with bilateral treaties.[323]

1.6.1 "Reservations" to bilateral treaties

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty, does not constitute a reservation within the meaning of the present Guide to Practice.

Commentary

(1) The 1969 and 1986 Vienna Conventions are silent on the subject of reservations to bilateral treaties: neither article 2, paragraph 1 (d), which defines reservations, nor articles 19 to 23,[324] which set out their legal regime, raise or exclude expressly the possibility of such reservations. The 1978 Convention on Succession of States in respect of Treaties explicitly contemplates only reservations to multilateral treaties.

(2) While at the outset of its work on reservations the Commission was divided with regard to reservations only to multilateral treaties,[325] in 1956, Sir Gerald Fitzmaurice stressed, in his initial report, the particular features of the regime of reservations to treaties with limited participation,[326] a category in which he expressly included bilateral agreements.[327] Likewise,

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[323] It being understood that transposition is not always possible. In particular, guideline 1.5.1, concerning statements of non-recognition, is not relevant to bilateral treaties.

[324] At best, one can say that article 20, paragraph 1, and article 21, paragraph 2, are directed at "the other contracting States [and contracting organizations]" or "the other parties to the treaty", both in the plural, and that article 20, paragraph 2, deals separately with treaties in whose negotiation a limited number of States or international organizations have participated, which is exactly what happens when a treaty involves only two parties. However, this argument does not in itself provide sufficient justification to say that the Conventions acknowledge the existence of reservations to bilateral treaties: the phrase "limited number of ... negotiating States" may mean "two or more States", but it can also be interpreted as indicating only those multilateral treaties that bind a small number of States.

[325] As early as 1950, the Commission stated that "the application ... in detail" of the principle that a reservation could become effective only with the consent of the parties "to the great variety of situations which may arise in the making of *multilateral* treaties was felt to require further consideration" (Report of the International Law Commission covering its second session, *Official Records of the General Assembly, Fifth Session, Supplement No. 12* (A/1316), para. 164, emphasis added). The study requested of the Commission in General Assembly resolution 478 (V) was supposed to (and did) focus exclusively on "the question of reservations to multilateral conventions".

[326] The Commission also questioned whether the particular features of "reservations" to bilateral treaties did not characterize rather the unilateral statements made with respect to "plurilateral" (or "multiple-party bilateral") treaties, such as, for example, the peace treaties concluded at the end of the First and Second World Wars. Those instruments have the appearance of multilateral treaties but may in fact be regarded as bilateral treaties. It is doubtful whether the distinction, although interesting from a theoretical point of view, affects the scope of guideline 1.6.1: either the treaty will be considered to have two actual parties (notwithstanding the number of those contracting), the situation covered by guideline 1.6.1, or the statement is made by one constituent of the "multiple party" and constitutes a conventional reservation within the meaning of guideline 1.1.

in his first report, in 1962, Sir Humphrey Waldock did not exclude the case of reservations to bilateral treaties but treated it separately.[328]

(3) However, this reference to bilateral treaties disappeared from the draft text after Sir Humphrey's proposals were considered. The introductory paragraph of the commentary to draft articles 16 and 17 (future articles 19 and 20 of the 1969 Convention), contained in the Commission's 1962 report and included in its final report in 1966, explains this as follows:

> "A reservation to a bilateral treaty presents no problem, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. If they arrive at an agreement — either adopting or rejecting the reservation — the treaty will be concluded; if not, it will fall to the ground."[329]

Following a suggestion by the United States of America, the Commission had furthermore expressly entitled the section of the draft articles on reservations as "Reservations to multilateral treaties".[330]

(4) It is hardly possible, however, to draw any conclusion from this in view of the positions taken during the Vienna Conference and the decision of that Conference to revert to the heading "Reservations" for Part II, section 2, of the 1969 Convention on the Law of Treaties. It should in particular be noted that the Conference's Drafting Committee approved a Hungarian proposal to delete the reference to multilateral treaties from the title of the section on reservations[331] in order not to prejudge the issue of reservations to bilateral treaties.[332]

(5) However, after that decision, the question occasioned an exchange of views between the President of the Conference, Mr. Roberto Ago, and the Chairman of the Drafting Committee, Mr. Mustapha K. Yasseen,[333] which indicates that the Conference had not, in

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[327] See draft article 38 ("Reservations to bilateral treaties and other treaties with limited participation") which he proposed: "In the case of bilateral treaties, or plurilateral treaties made between a limited number of States for purposes specially interesting those States, no reservations may be made, unless the treaty in terms so permits, or all the other negotiating States expressly so agree" (*Yearbook ... 1956*, vol. II, p. 115).

[328] See draft article 18, para. 4 (a): "In the case of a bilateral treaty, the consent of the other negotiating State to the reservation shall automatically establish the reservation as a term of the treaty between the two States" (*Yearbook ... 1962*, vol. II, p. 61).

[329] *Yearbook ... 1962*, vol. II, pp. 180–181, and *Yearbook ... 1966*, vol. II, p. 203. In his first report, Sir Humphrey Waldock simply said: "Reservations to bilateral treaties present no problem" (*Yearbook ... 1962*, vol. II, p. 62).

[330] See the report of the Commission to the General Assembly on the work of the first part of its seventeenth session, *Yearbook ... 1965*, vol. II, p. 161, and the report of the Commission to the General Assembly on the work of its eighteenth session, *Yearbook ... 1966*, vol. II, p. 202; see also the comments of Sir Humphrey Waldock, fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, p. 45.

[331] Document A/CONF.39/C.1/L.137; see also a similar amendment submitted by Chile (A/CONF.39/C.1/L.22).

[332] See the explanations of Mr. Yasseen, Chairman of the Drafting Committee, *Official Records of the United Nations Conference on the Law of Treaties, Second session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, A/CONF.39/11/Add.1, (United Nations, New York, 1970, Sales No. E.70.V.6) Second session, 10th plenary meeting, 29 April 1969, para. 23, p. 28.

[333] *Ibid.*, 11th plenary meeting, 30 April 1969, p. 37:

> "19. **The President** said that, personally, he had been surprised to hear that the Drafting Committee had entertained the idea of reservations to bilateral treaties. As a law student, he had been taught that that idea was a contradiction in terms, for when one party to such a treaty proposed a change, that constituted a new proposal, not a reservation. He had

fact, taken a firm position as to the existence and legal regime of possible reservations to bilateral treaties.[334]

(6) The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations sheds no new light on the question.[335] However, the 1978 Vienna Convention on Succession of States in respect of Treaties tends to confirm the general impression gathered from a review of the 1969 and 1986 Conventions that the legal regime of reservations provided for in those Conventions (to which article 20, paragraph 3, of the 1978 Convention refers) is applicable solely to multilateral treaties and not to bilateral treaties. Indeed, article 20, the only provision of that instrument to deal with reservations, is included in section 2 of Part III,[336] which deals with multilateral treaties,[337] and expressly stipulates that it is applicable "when a newly independent State establishes its status as a party or as a contracting State to a *multilateral* treaty by a notification of succession", the notification of succession being generally admitted in respect of open multilateral treaties.

(7) Here again, however, the only conclusion one can draw is that the Vienna regime is not applicable to reservations to bilateral treaties, including in cases of succession of States. This

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> interpreted the abbreviation of the title of Section 2 as an admission that the applicability of reservations only to multilateral treaties was self-evident. If there were any doubt on the matter, the Drafting Committee would do well to revert to the title proposed by the International Law Commission.
>
> "20. **Mr. Yasseen**, Chairman of the Drafting Committee, said that some members of the Drafting Committee had thought that the practice of certain States might convey the impression that reservations could be made to bilateral treaties. The deletion of the reference to multilateral treaties from the title of Section 2 did not, however, mean that the Drafting Committee had decided that reservations to bilateral treaties were possible. The purpose of the deletion had merely been not to prejudge the question in any way.
>
> "21. Speaking as the representative of Iraq, he said he fully shared the President's view that any change proposed to a bilateral treaty represented a new offer and could not be regarded as a reservation.
>
> "22. **The President** asked whether the Drafting Committee agreed that the procedures set out in the articles in Section 2 related only to multilateral treaties.
>
> "23. **Mr. Yasseen**, Chairman of the Drafting Committee, said he was not in a position to confirm that statement on behalf of the entire Drafting Committee, which had not been unanimous on the point.
>
> "24. **The President** said that, independently of the principle involved, the procedures laid down in the articles on reservations that the Conference had considered were not applicable to bilateral treaties."

[334] Writers interpret this exchange of views differently. Compare J.M. Ruda, footnote 56 above, p. 110, R. Szafarz, footnote 27 above, and R.W. Edwards, footnote 59 above, 1989, p. 404.

[335] In his fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations, Reuter said: "treaties concluded by international organizations are almost always bilateral treaties, for which reservations may come into play in theory but are of no interest in practice", *Yearbook ... 1975*, vol. II, p. 36. See also the Report of the Commission to the General Assembly on the work of its twenty-ninth session, *Yearbook ... 1977*, vol. II, Part Two, commentary to draft article 19, p. 106, the Report of the Commission to the General Assembly on the work of its thirty-third session, *Yearbook ... 1981*, vol. II, Part Two, pp. 137–138, and the report of the Commission on the work of its thirty-fourth session, *Yearbook ... 1982*, vol. II, Part Two, p. 34.

[336] Which concerns only "Newly independent States".

[337] Section 3 deals with "Bilateral treaties".

does not mean, however, that the concept of "reservations" to bilateral treaties is inconceivable or non-existent.

(8) In practice some States do not hesitate to make unilateral statements which they call "reservations" with respect to bilateral treaties, while others declare themselves hostile to them.

(9) This is a practice which has been in existence for a long time,[338] widely used by the United States of America[339] and, less frequently, by other States in their relations with the United States.[340] The fact remains that, of all the States which replied to the Commission's questionnaire on reservations, only the United States gave an affirmative to question 1.4[341] all the others answered in the negative.[342] Some of them simply said that they do not formulate reservations to bilateral treaties, but others expressed concerns about that practice.[343]

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[338] The oldest example of a "reservation" to a bilateral treaty goes back to the resolution of 24 June 1795, in which the United States Senate authorized ratification of the Jay Treaty of 19 November 1794, "on condition that there be added to the said treaty an article, whereby it shall be agreed to suspend the operation of so much of the 12th article as respects the trade which his said Majesty thereby consents may be carried on, between the United States and his islands in the West Indies, in the manner, and on the terms and conditions therein specified" (quoted by W.W. Bishop, footnote 288 above, pp. 260–261; Bishop even cites a precedent that goes back to the Articles of Confederation: in 1778, the United States Congress demanded and obtained renegotiation of the Treaty of Commerce with France of 6 February 1778 (*ibid.*, note 13)).

[339] In 1929, Marjorie Owen estimated somewhere between 66 and 87 bilateral treaties had been subject to a "reservation" by the United States after the Senate had imposed a condition on their ratification ("Reservations to Multilateral Treaties", *Yale Law Journal*, 1928–1929, p. 1091). More recently, Kevin Kennedy compiled detailed statistics covering the period from 1795 to 1990. These data show that the United States Senate made its advice and consent to ratify conditional for 115 bilateral treaties during that period, a figure that includes interpretative declarations, which account for 15 per cent on average of all bilateral treaties to which the United States has become a party in just under two centuries (Kevin C. Kennedy, "Conditional approval of treaties by the U.S. Senate", *Loyola of Los Angeles International and Comparative Journal*, October 1996, p. 98). The same statistics show that this practice of "amendments" or "reservations" involves all categories of agreement and is particularly frequent in the area of extradition, friendship, commerce and navigation treaties ("*FCN treaties*"), and even peace treaties (see *ibid.*, pp. 99–103 and 112–116). In its response to the questionnaire on reservations, the United States of America confirmed that this practice remains important where the country's bilateral treaties are concerned. The United States attached to its response a list of 13 bilateral treaties that were accepted with reservations between 1975 and 1985. Such was the case, for example, of the Treaties concerning the permanent neutrality and operation of the Panama Canal of 7 September 1977, the Special Agreement under which Canada and the United States agreed to submit their dispute on the delimitation of maritime zones in the Gulf of Maine area to the International Court of Justice, and the Supplementary Extradition Treaty with the United Kingdom of 25 June 1985.

[340] Either its partners make counter-proposals in response to the reservations of the United States (see examples given by M. Owen, footnote 339 above, pp. 1090–1091 and W.W. Bishop, Jr., footnote 288 above, pp. 267–269), or they themselves take the initiative (see the examples given by M.M. Whiteman, footnote 25 above, p. 161 (Japan), M. Owen, *ibid.*, p. 1093 (New Grenada), Green Haywood Hackworth, *Digest of International Law*, vol. V, Washington, D.C., United States Printing Office, 1943, pp. 126–130 (Portugal, Costa Rica, El Salvador, Romania).

[341] The question read: "Has the State formulated reservations to bilateral treaties?".

[342] Bolivia, Canada, Chile, Croatia, Denmark, Finland, France, Germany, Holy See, India, Israel, Italy, Japan, Republic of Korea, Kuwait, Mexico, Monaco, New Zealand, Panama, Peru, San Marino, Slovakia, Slovenia, Spain, Sweden and Switzerland.

[343] Cf. Germany's position: "The Federal Republic has not formulated reservations to bilateral treaties. It shares the commonly held view that a State seeking to attach a reservation to a

(10) Another important feature of the practice of States in this area is the fact that, in all cases where the United States or its partners have entered "reservations" (often called "amendments")[344] to bilateral treaties, they have endeavoured in all cases to renegotiate the treaty in question and to obtain the other contracting State's acceptance of the modification which is the subject of the "reservation".[345] If agreement is obtained, the treaty enters into force with the modification in question;[346] if not, the ratification process is discontinued and the treaty does not enter into force.[347]

(11) The following conclusions may be drawn from this review:

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bilateral treaty would in effect refuse acceptance of that treaty as drafted. This would constitute an offer for a differently formulated treaty incorporating the content of the reservation and would thus result in the reopening of negotiations." The replies from Italy and the United Kingdom were very similar. However, the United Kingdom added: "The United Kingdom does not itself seek to make reservations a condition of acceptance of a bilateral treaty. If Parliament were (exceptionally) to refuse to enact the legislation necessary to enable the United Kingdom to give effect to a bilateral treaty, the United Kingdom authorities would normally seek to renegotiate the treaty in an endeavour to overcome the difficulties."

[344] Kevin C. Kennedy has identified 12 different categories of conditions set by the United States Senate for ratification of treaties (bilateral and multilateral) but notes that 4 of these account for 90 per cent of all cases: "understandings", "reservations", "amendments" and "declarations". However, the relative share of each varies over time, as the following table shows:

Type of condition	*1845–1895*	*1896–1945*	*1946–1990*
Amendments	36	22	3
Declarations	0	3	14
Reservations	1	17	44
Understandings	1	38	32

(footnote 339 above, p. 100).

[345] As the Department of State noted in its instructions to the United States Ambassador in Madrid following Spain's refusal to accept an "amendment" to a 1904 extradition treaty which the Senate had adopted, "[t]he action of the Senate consists in advising an amendment which, if accepted by the other party, is consented to in advance. In other words, the Senate advises that the President negotiate with the foreign Government with a view to obtaining its acceptance of the advised amendment". (Quoted by G.H. Hackworth, footnote 340 above, p. 115.)

[346] In some cases, the other contracting State makes counter-offers which are also incorporated into the treaty. For example, Napoleon accepted a modification made by the Senate to the Treaty of Peace and Amity of 1800 between the United States and France, but then attached his own condition to it, which the Senate accepted (see M. Owen, footnote 339 above, pp. 1090–1091, or W.W. Bishop, Jr., footnote 288 above, pp. 267–268).

[347] See, for example, the United Kingdom's rejection of amendments to an 1803 convention concerning the border between Canada and the United States and an 1824 convention for suppression of the African slave trade which the United States had requested (see W.W. Bishop, footnote 288 above, p. 266) or the United Kingdom's refusal to accept the United States reservations to the treaty of 20 December 1900 dealing with the Panama Canal, which was consequently renegotiated and led to the signing of a new agreement, the Hay-Pauncefote Treaty of 28 November 1902 (see G.H. Hackworth, footnote 340 above, pp. 113–114). An even more complicated case concerns ratification of the Convention of Friendship, Reciprocal Establishments, Commerce and Extradition between the United States of America and Switzerland of 25 November 1850, which was the subject of a request for amendments, first by the United States Senate, then by Switzerland, and then again by the Senate, all of which were adopted and the instruments of ratification, which had been amended three times, exchanged five years after the date of signature (*ibid.*, p. 269).

1. With the exception of the United States of America, States seldom formulate reservations to bilateral treaties, although exceptions do exist (but these apparently occur only in the context of bilateral treaty relations with the United States); and

2. This practice, which may elicit constitutional objections in some countries, does not do so at the international level, if only because the States concluding treaties with the United States of America, having on occasion rejected reservations proposed by that country, have never raised any objections of principle and have even, in some cases, submitted their own "counter-reservations" of a similar nature.

(12) In the light of the practice described above it would appear that, despite some obvious points in common witn reservations to multilateral treaties, "reservations" to bilateral treaties are different in one key respect: their intended and their actual effects.

(13) There is no doubt that "reservations" to bilateral treaties are formulated unilaterally by States (and, *a priori*, nothing prevents an international organization from doing the same) once the negotiations have ended, and that they bear different names that may reflect real differences in domestic law, although not in international law. From these different standpoints, they meet the first three criteria set out in the Vienna definition, reproduced in guideline 1.1.

(14) The Commission has found that a "reservation" to a bilateral treaty may be made at any time after the negotiations have ended, once a signature has been put to the final agreed text but before the treaty enters into force, as such statements are aimed at modifying its text.

(15) It is precisely this feature, however, which distinguishes such "reservations" to bilateral treaties from reservations formulated in respect of multilateral treaties. There is no doubt that with a "reservation", one of the parties to a bilateral treaty intends to modify the legal effect of the provisions of the original treaty. Yet while a reservation does not affect the provisions of the instrument in the case of a multilateral treaty, a "reservation" to a bilateral treaty purports to modify it: if the reservation is established,[348] it is not the "*legal effect*" of the provisions in question that will be modified or excluded "*in their application*" to the author; it is the provisions themselves which, by the very nature of things, will be modified. A reservation to a multilateral treaty has a subjective effect: if it is accepted, the legal effect of the provisions in question is modified *vis-à-vis* the State or the international organization that formulated it. A reservation to a bilateral treaty has an objective effect: if it is accepted by the other State, it is the treaty itself that is amended.

(16) As is the case with a reservation to a multilateral treaty,[349] a reservation to a bilateral treaty produces effects only if it is accepted, in one way or another, expressly or implicitly: the co-contracting State or international organization must accept the "reservation", or else the treaty will not enter into force. Thus the difference does not have to do with the need for acceptance, which is present in both cases, in order for the reservation to produce its effects, but with the consequences of acceptance:

- In the case of a multilateral treaty, an objection does not prevent the instrument from entering into force, even, at times, between the objecting State or international organization and the author of the reservation,[350] and its provisions remain intact;

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[348] Concerning the concept of the establishment of a reservation, see section 4.1 of the Guide to Practice.

[349] See section 4.1 of the Guide to Practice.

[350] See article 20, paragraph 4 (b), of the 1969 and 1986 Conventions and guideline 4.3.1 (Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation).

- In the case of a bilateral treaty, the absence of acceptance by the co-contracting State or international organization prevents the entry into force of the treaty; acceptance entails its modification.

(17) Thus a "reservation" to a bilateral treaty appears to be a proposal to amend the treaty in question or an offer to renegotiate it. This analysis corresponds to the prevailing views in doctrine.[351] Moreover, saying that acceptance of a "reservation" to a bilateral treaty is equivalent to amending the treaty does not make the reservation an amendment: it is simply a unilateral proposal to amend, prior to the treaty's entry into force,[352] while the amendment itself is treaty-based, is the result of an agreement between the parties[353] and is incorporated into the negotiated text, even if it can be contained in one or more separate instruments.

(18) As the Solicitor for the Department of State noted in a memorandum dated 18 April 1921:

> "The action of the Senate when it undertakes to make so-called 'reservations' to a treaty is evidently the same in effect as when it makes so-called 'amendments', whenever such reservations and amendments in any substantial way affect the terms of the treaty. The so-called reservations which the Senate has been making from time to time are really not reservations as that term has generally been understood in international practice up to recent times."[354]

(19) This is also the view of the Commission, which believes that unilateral statements by which a State (or an international organization) purports to obtain a modification of a treaty whose final text has been agreed by the negotiators does not constitute a reservation in the usual meaning of the term in the context of the law of treaties, as has been confirmed by the 1969, 1978 and 1986 Vienna Conventions.

(20) Although the Commission considers such a statement to constitute an offer to renegotiate the treaty, which, if accepted by the other contracting State or the other contracting organization, becomes an amendment to the treaty, it does not appear essential for this to be stated in the Guide to Practice, since, as the different categories of unilateral statement mentioned in section 1.5 above are neither reservations in the usual meaning of the term nor interpretative statements, they do not fall within the scope of the Guide to Practice.[355]

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[351] Some authors have concluded that a reservation to a bilateral treaty is purely and simply inconceivable (see Charles Rousseau, *Droit international public*, vol. I, *Introduction et sources* (Paris, Pedone, 1970), p. 122, or Alfredo Maresca, *Il diritto dei tratatti – La Convenzione codificatrice di Vienna del 23 Maggio 1969* (Milan, Giuffrè, 1971), pp. 281–282). But all stress the need for the express consent of the other party and the resulting modification of the treaty's actual text (see D.H. Miller, footnote 26 above, pp. 76–77; M. Owen, footnote 339 above, pp. 1093–1094; W.W. Bishop, footnote 288 above, p. 271, note 14).

[352] The term "counter-offer" has been used. M. Owen (footnote 339 above, p. 1091) traces this idea of a "counter-offer" back to Hyde, *International Law*, 1922, para. 519. The expression also appears in the American Law Institute's *Restatement of the Law Third – The Foreign Relations Law of the United States*, Washington, D.C., vol. 1, 14 May 1986, para. 113, p. 182; see also the position of Mr. Ago and Mr. Yasseen, cited in footnote 333 above, and that of Paul Reuter, footnote 335 above).

[353] See article 39 of the 1969 and 1986 Conventions.

[354] Quoted by G.H. Hackworth, footnote 340 above, p. 112; along the same lines, see the position of D.H. Miller, footnote 26 above.

[355] See guideline 1.5 and commentary thereto.

1.6.2 Interpretative declarations in respect of bilateral treaties

Guidelines 1.2 and 1.4 are applicable to interpretative declarations in respect of both multilateral and bilateral treaties.

Commentary

(1) The silence of the Vienna Conventions on the Law of Treaties extends *a fortiori* to interpretative declarations made in respect of bilateral treaties: the Conventions do not mention interpretative declarations in general[356] and are quite cautious insofar as the rules applicable to bilateral treaties are concerned.[357] Such declarations are nonetheless common and, unlike "reservations" to the same treaties,[358] they correspond in all respects to the definition of interpretative declarations adopted for guideline 1.2.

(2) Almost as old as the practice of "reservations" to bilateral treaties,[359] the practice of interpretative declarations in respect of such treaties is less geographically limited[360] and does not seem to give rise to objections of principle. Of the 22 States that answered question 3.3[361] of the Commission's questionnaire on reservations, 4 said that they had formulated interpretative declarations in respect of bilateral treaties; and one international organization, the International Labour Organization, wrote that it had done so in one situation, while noting that the statement was in reality a "corrigendum", "made in order not to delay signature". However incomplete, these results are nevertheless significant: while only the United States claimed to make "reservations" to bilateral treaties,[362] it is joined here by Panama, Slovakia and the United Kingdom and by one international organization;[363] and while several States criticized the very principle of "reservations" to bilateral treaties,[364] none of them showed any hesitation concerning the formulation of interpretative declarations in respect of such treaties.[365]

(3) The extent and consistency of the practice of interpretative declarations in respect of bilateral treaties leave little doubt as to how this institution is viewed in international law: it is clearly a "general practice accepted as law".

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[356] See para. (1) of the commentary to guideline 1.2.

[357] See para. (1) of the commentary to guideline 1.6.

[358] See guideline 1.6.1 and commentary thereto.

[359] Bishop notes a declaration attached by Spain to its instrument of ratification of the Treaty of 22 February 1819 ceding Florida (W. Bishop, footnote 288 above, p. 316).

[360] See paras. (9) to (11) of the commentary to guideline 1.6.1. However, as with "reservations" to bilateral treaties, the largest number of examples can be found in the practice of the United States of America; in just the period covered by that country's reply to the questionnaire on reservations (1975–1995), it mentions 28 bilateral treaties to which it attached interpretative declarations upon expressing its consent to be bound.

[361] "Has the State attached any interpretative declarations to the expression of its consent to be bound by bilateral treaties?"

[362] See para. (9) of the commentary to guideline 1.6.1.

[363] In addition, Sweden said: "It may have happened, although very rarely, that Sweden has made interpretative declarations, properly speaking, with regard to bilateral treaties. [...] Declarations of a purely informative nature of course exist."

[364] See the commentary to guideline 1.6.1, footnote 342.

[365] The United Kingdom criticizes the United States "understanding" on the matter of the Treaty concerning the Cayman Islands relating to Mutual Legal Assistance; but what the Government of the United Kingdom seems to be rejecting here is the possibility of modifying a bilateral treaty under the guise of interpretation (by means of "understandings" which are really "reservations").

(4) Whereas the word "reservation" certainly does not have the same meaning when it is applied to a unilateral statement made in respect of a bilateral treaty as it does when it concerns a multilateral instrument, the same is not true in the case of interpretative declarations: in both cases, they are unilateral statements, however named or phrased, made "by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions".[366] Thus, guideline 1.2, which provides this definition, may be considered to be applicable to declarations which interpret bilateral as well as multilateral treaties.

(5) On one point, however, the practice of interpretative declarations in respect of bilateral treaties seems to differ somewhat from the common practice for multilateral treaties. Indeed, it appears from what has been written that "in the case of a bilateral treaty it is the invariable practice, prior to the making of arrangements for the exchange of ratifications and sometimes even prior to ratification of the treaty, for the government making the statement or declaration to notify the other government thereof in order that the latter may have an opportunity to accept, reject, or otherwise express its views with respect thereto".[367] And, once approved, the declaration becomes part of the treaty:

> "... where one of the parties to a treaty, at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument [...], and when the treaty is afterwards ratified by the other party with the declaration attached to it, and their ratifications duly exchanged – the declaration thus annexed is part of the treaty and as binding and obligatory as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument, as it stood when the ratifications were exchanged".[368]

(6) It is difficult to argue with this reasoning, which leads one to ask whether interpretative declarations that are made in respect of bilateral treaties, just like "reservations" to such treaties,[369] must necessarily be accepted by the other party. In reality, this does not seem to be the case: in (virtually) all cases, interpretative declarations made in respect of bilateral treaties have been accepted because their author requested it, but one can easily imagine that it might not make such a request. Indeed, the logic which leads one to distinguish between interpretative declarations which are conditional and those which are not[370] would seem to be easily transposed to the case of bilateral treaties: everything depends on the author's intention. It may be the condition *sine qua non* of the author's consent to the treaty, in which case it is a conditional interpretative declaration, identical in nature to those made in respect of multilateral treaties and consistent with the definition proposed in guideline 1.4. But it may also be simply intended to inform the partner of the meaning and scope which the author attributes to the provisions of the treaty without, however, seeking to impose that interpretation on the partner, and in this case it is a "simple" interpretative declaration, which, like those made in respect of multilateral treaties,[371] can actually be made at any time.

(7) Accordingly, the Commission felt that it was not necessary to adopt specific guidelines on interpretative declarations in respect of bilateral treaties, since these fall under the same

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[366] Cf. guideline 1.2.

[367] M.M. Whiteman, footnote 25 above, pp. 188–189.

[368] Judgement of the United States Supreme Court concerning the Spanish declaration made in respect of the Treaty of 22 February 1819, *Doe v. Braden*, 16 How. 635, 656 (US 1853), cited by W.W. Bishop, footnote 288 above, p. 316.

[369] See paras. (16) to (20) of the commentary to guideline 1.6.1.

[370] See guideline 1.4 and commentary thereto.

[371] See guideline 1.2 and paras. (21) to (30) of commentary thereto.

definition as interpretative declarations in respect of multilateral treaties, whether it be their general definition, as given in guideline 1.2, or the distinction between simple and conditional interpretative declarations which follows from guideline 1.4. It therefore seems to be sufficient to take note of this in the Guide to Practice.

(8) On the other hand, guideline 1.2.1, concerning interpretative declarations formulated jointly, is not, of course, relevant in the case of bilateral treaties.

(9) As regards section 1.3 of this chapter, concerning the distinction between reservations and interpretative declarations, it is difficult to see how, if the term "reservations" in respect of bilateral treaties does not correspond to the definition of reservations given in guideline 1.1, it would be applicable to the latter. At best, it may be thought that the principles set forth therein can be applied, *mutatis mutandis*, to distinguish interpretative declarations from other unilateral statements made in respect of bilateral treaties.

1.6.3 Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes an authentic interpretation of that treaty.

Commentary

(1) Although acceptance of an interpretative declaration formulated by a State in respect of a bilateral treaty is not inherent in such a declaration,[372] it might be asked whether acceptance modifies the legal nature of the interpretative declaration.

(2) In the Commission's opinion, the reply to this question is affirmative: when an interpretative declaration made in respect of a bilateral treaty is accepted by the other party,[373] it constitutes the authentic interpretation thereof. As the Permanent Court of International Justice noted, "the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it".[374] Yet in the case of a bilateral treaty this power belongs to both parties. Accordingly, if they agree on an interpretation, that interpretation prevails and itself takes on the nature of a treaty, regardless of its form,[375] exactly as "reservations" to bilateral treaties do once they have been accepted by the co-contracting State or international organization.[376] It becomes an agreement collateral to the treaty in the sense of paragraphs 2 or 3 (a) of article 31 of the 1969 and 1986 Vienna Conventions; as such, it must be taken into consideration in interpreting the treaty.[377]

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[372] See paras. (5) and (6) of the commentary to guideline 1.6.2.

[373] And one can imagine that this would be the case even when an interpretative declaration is not conditional.

[374] Advisory Opinion of 6 December 1923, *Jaworzina* case, Series B, No. 8, p. 37.

[375] Exchange of letters, protocol, simple oral agreement, etc.

[376] See guideline 1.6.1 and paras. (15) to (19) of the commentary thereto.

[377] Article 31 of the 1969 Convention reads: "2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."

Moreover, this analysis is consistent with that of the United States Supreme Court in the *Doe* case.[378]

(3) While it is aware that considering this phenomenon in the first part of the Guide to Practice exceeds the scope of that part, which is devoted to the definition, and not the legal regime, of reservations and interpretative declarations,[379] the Commission has seen fit to mention it in a guideline. It does not in fact return to the highly specific question of "reservations" and interpretative declarations in respect of bilateral treaties: in the first case, because they are not reservations, and in the second, because interpretative declarations to bilateral treaties have no distinguishing feature with respect to interpretative declarations to multilateral treaties, except the very one covered in guideline 1.6.2. For purely practical reasons, then, it seems appropriate to make that clear at this stage.

1.7 Alternatives to reservations and interpretative declarations

Commentary

(1) Reservations are not the only procedure enabling the parties to a treaty to exclude or modify the legal effect of certain provisions of the treaty or of certain particular aspects of the treaty as a whole. Accordingly, it seems useful to link the consideration of the definition of reservations to that of other procedures, which, while not constituting reservations, are, like them, designed to enable and do indeed enable States and international organizations to modify obligations under treaties to which they are parties; what are involved are alternatives to reservations, and recourse to such procedures may probably make it possible, in specific cases, to overcome some problems linked to reservations. In the Commission's view, these procedures, far from constituting invitations to States to limit the effects of the treaty, would instead help to make recourse to reservations less "necessary" or frequent by offering more flexible treaty techniques.

(2) Some of these alternatives differ profoundly from reservations in that they constitute, not unilateral statements, but clauses in the treaty itself and thus relate more to the process of drafting a treaty than to its application. As they produce effects almost identical to those produced by reservations, these techniques nevertheless deserve to be mentioned in the part of the Guide to Practice devoted to the definition of reservations, if only so as to identify more clearly the key elements of the concept, distinguish them from reservations and, where applicable, draw appropriate conclusions with regard to the legal regime of reservations.

(3) The same problem arises, *mutatis mutandis*, with regard to interpretative declarations whose objective may be achieved by other means.

(4) Some of these alternative procedures are the subject of guidelines in section 1.5 of the Guide to Practice. However, these deal only with "unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations",[380] excluding other techniques for modifying the provisions of a treaty or their interpretation. Given the practical nature of the Guide, the Commission considered that it might be useful to devote a short section of the instrument to the range of procedures constituting alternatives to reservations and interpretative declarations, to serve as a reminder to users and, in particular, to the negotiators of treaties of the wide range of possibilities available to them for that purpose.

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[378] See the commentary to guideline 1.6.2, footnote 368.

[379] Cf. guideline 1.8.

[380] Cf. guideline 1.5.

1.7.1 Alternatives to reservations

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

- the insertion in the treaty of a clause purporting to limit its scope or application;
- the conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

Commentary

(1) The formulation of reservations constitutes a means for States (and to some extent, for international organizations) partially to preserve their freedom of action while accepting in principle to limit that freedom by becoming bound by a treaty. This "concern of each Government with preserving its capacity to reject or adopt [and adapt] the law (a minimal, defensive concern)"[381] is particularly present in two situations: where the treaty in question deals with especially sensitive matters or contains exceptionally onerous obligations[382] or where it binds States whose situations are very different and whose needs are not necessarily met by a uniform set of rules.

(2) It is this type of consideration which led the authors of the Constitution of the International Labour Organization (ILO) to state in article 19, paragraph 3:

> "In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries."[383]

According to the ILO, which bases its refusal to permit reservations to the international labour conventions on this article:[384]

> "This would suggest that the object of the framers of the Treaty of Peace, in imposing on the Conference this obligation to give preliminary consideration to the special circumstances of each country, was to prevent States from pleading, after the adoption of a convention, a special situation which had not been submitted to the Conference's judgement."[385]

As in the case of reservations, but by a different procedure, the aim is:

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[381] Guy de Lacharrière, *La politique juridique extérieure* (Paris, Économica, 1983), p. 31.

[382] Such is the case, for example, of the charters of international "integration" organizations (cf. the Treaties establishing the European Communities; see also the Rome Statute of the International Criminal Court).

[383] This provision reproduces the provisions of article 405 of the Treaty of Versailles.

[384] See para. (3) of the commentary to guideline 1.1.6.

[385] "Admissibility of reservations to general conventions", memorandum by the Director of the International Labour Office submitted to the Council on 15 June 1927, League of Nations, *Official Journal*, July 1927, p. 883. See also "Written Statement of the International Labour Organization", in *I.C.J. Pleadings, Oral Arguments, Documents – Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, pp. 224 and 236.

> "to protect the integrity of the essential object and purpose of the treaty while simultaneously allowing the maximum number of States to become parties, though they are unable to assume full obligations".[386]

(3) The quest to reconcile these two goals is the aim both of reservations in the strict sense and of the alternative procedures that are the subject of guideline 1.7.1. Reservations are one of the means intended to bring about this reconciliation. However, they are far from "the only procedure which makes it possible to vary the content of a treaty in its application to the parties"[387] without undermining its object and purpose. Many other procedures are used to give treaties the flexibility necessitated by the diversity of situations of the States or international organizations seeking to be bound,[388] it being understood that the word "may" in the text of guideline 1.7.1 must not be interpreted as implying any value judgement as to the use of one or the other technique, but must be construed as being purely descriptive.

(4) The common feature of these procedures, which makes them alternatives to reservations, is that, like the latter, they purport "to exclude or to modify the legal effect of certain provisions of the treaty" or "of the treaty as a whole with respect to certain specific aspects"[389] in their application to certain parties. There the similarities end, however, and drawing up a list of them proves difficult, "for the imagination of legal scholars and diplomats in this area has proved to be unlimited".[390] Furthermore, on the one hand, some treaties combine several of these procedures with each other and with reservations and, on the other hand, it is not always easy to differentiate them clearly.[391]

(5) There are many ways of grouping them: by techniques used (treaty or unilateral), by the object pursued (extension or restriction of obligations under the treaty) or by the reciprocal or non-reciprocal nature of their effects. They may also be distinguished according to whether the modification of the legal effects of the provisions of a treaty is provided for in the treaty itself or results from exogenous elements.

(6) In the first of these two categories, mention can be made of the following:

- Restrictive clauses, "which limit the purpose of the obligation by making exceptions to and placing limits on it"[392] in respect of the area covered by the obligation or its period of validity;

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[386] W.P. Gormley, footnote 115 above, p. 65. On the strength of these similarities, this author, at the cost of terminological confusion, encompasses in a single study "all devices the application of which permit a State to become a party to a multilateral convention without immediately assuming all of the maximum obligations set forth in the text", *ibid.*, p. 64.

[387] Jean Combacau and Serge Sur, footnote 166 above, p. 136.

[388] Some authors have endeavoured to reduce all these procedures to one: see, *inter alia*, Georges Droz, who contrasts "reservations" and "options", footnote 109 above, p. 383). On the other hand, Ferenc Majoros believes that "the set of 'options' is merely an amorphous group of provisions *which afford various options*" ("Le régime de réciprocité de la Convention de Vienne et les réserves dans les Conventions de La Haye", *J.D.I.*, 1974, p. 88 (italics in original).

[389] See guideline 1.1.

[390] M. Virally, footnote 294 above, p. 6.

[391] *Ibid.*, p. 17.

[392] *Ibid.*, p. 10. This notion corresponds to "clawback clauses" as they have been defined by Rosalyn Higgins: "By a 'clawback' clause is meant one that permits, in normal circumstances, breach of an obligation for a specified number of public reasons" ("Derogations under Human Rights Treaties", *B.Y.B.I.L.*, 1976–1977, p. 281; see also Fatsah Ouguergouz, "L'absence de clause de dérogation dans certains traités relatifs aux droits de l'homme: les réponses du droit international général", R.G.D.I.P., 1994, p. 296). Other authors propose a more restrictive definition; according to R. Gitleman, clawback clauses are provisions "that entitle a State to

- Escape clauses, "which have as their purpose to suspend the application of general obligations in specific cases",[393] and among which mention can be made of saving and derogations clauses;[394]
- Opting-[or contracting-]in clauses, which have been defined as "those to which the parties accede only through a special acceptance procedure, separate from accession to the treaty as a whole";[395]
- Opting-[or contracting-]out clauses, "under which a State will be bound by rules adopted by majority vote even if it does not express its intent not to be bound within a certain period of time";[396] or
- Those which offer the parties a choice among several provisions; or again,
- Reservation clauses, which enable the contracting States and contracting organizations to formulate reservations, subject to certain conditions and restrictions, as appropriate.

(7) In the second category,[397] which includes all procedures that, although not expressly envisaged therein, enable the parties to modify the effect of the provisions of the treaty, are the following:

- reservations again, where their formulation is not provided for or regulated by the instrument to which they apply;

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restrict the granted rights to the extent permitted by domestic law" ("The African Charter on Human and Peoples' Rights", *Virg. J. Int. L. 1982*, p. 691, cited by Rusen Ergec, *Les droits de l'homme à l'épreuve des circonstances exceptionnelles – Etude sur l'article 15 de la Convention européenne des droits de l'homme* (Brussels, Bruylant, 1987), p. 25).

[393] M. Virally, footnote 294 above, p. 12.

[394] Escape clauses permit a contracting State or contracting organization temporarily not to meet certain treaty requirements owing to the difficulties it is encountering in fulfilling them as a result of special circumstances, whereas waivers, which produce the same effect, must be authorized by the other Parties or by an organ responsible for monitoring treaty implementation. A comparison of article XIX, paragraph 1, and article XXV, paragraph 5, of the 1947 General Agreement on Tariffs and Trade shows the difference clearly. The first article reads: "If, as a result of unforeseen developments and of the effect of the obligations incurred by a Contracting Party under this Agreement, including tariff concessions, any product is being imported into the territory of that Contracting Party in such increased quantities and under such conditions as to threaten serious injury to domestic producers in that territory of like products, the Contracting Party shall be free, in respect of such products, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession." This is an escape clause (this option has been expanded on in the 1994 GATT Agreement on Safeguards (Marrakesh, 15 April 1994)). On the other hand, the general provision laid down in article XXV, paragraph 5 (entitled "Joint Action by the Contracting Parties") is a waiver: "In exceptional circumstances not elsewhere provided for in this Agreement, the Contracting Parties may waive an obligation imposed upon a Contracting Party by this Agreement; provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the Contracting Parties" (see also article VIII, section 2 (a), of the IMF Agreement).

[395] Michel Virally, footnote 294 above, p. 13.

[396] B. Simma, footnote 99 above, p. 329; see also C. Tomuschat, footnote 99 above, pp. 264 ff.

[397] Among the latter modification techniques, the first two are unilateral, but derive from the general international law of treaties, while the last two derive from the joint initiative of the parties to the treaty, or some of them, following its adoption.

- suspension of the treaty,[398] whose causes are enumerated and codified in part V of the Vienna Conventions of 1969 and 1986, particularly the application of the principles *rebus sic stantibus*[399] and *non adimpleti contractus*;[400]
- amendments to the treaty, where they do not automatically bind all the parties thereto;[401] or
- protocols or agreements having as their purpose (or effect) to supplement or modify a multilateral treaty only between certain parties,[402] including within the framework of "bilateralization".[403]

(8) This list by no means claims to be exhaustive: as emphasized above,[404] negotiators display seemingly limitless ingenuity which precludes any pretensions to exhaustiveness. Consequently, guideline 1.7.1 is restricted to mentioning two procedures that are not mentioned elsewhere and are sometimes characterized as "reservation", although they do not by any means meet the definition contained in guideline 1.1.

(9) Other "alternatives to reservations", which take the form of unilateral statements made in accordance with a treaty, are the subject of guidelines appearing in section 1.5 of the Guide to Practice.

(10) Other alternative procedures are even more different. Such is the case, for example, of notifications of the suspension of a treaty. These, too, are unilateral statements, as are reservations, and, like reservations, they may purport to exclude the legal effects of certain provisions of the treaty, if separable,[405] in their application to the author of the notification, but only on a temporary basis. Governed by article 65, paragraph 1, of the 1969 and 1986 Vienna Conventions,[406] their purpose is to release the parties "between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension",[407] and they are clearly different from reservations, not so much by the temporary nature of the exclusion of the operation of the treaty[408] as by the

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[398] Termination of the treaty is a different matter; it puts an end to the treaty relations.

[399] Cf. article 62 of the Vienna Conventions.

[400] Cf. article 60 of the Vienna Conventions.

[401] Cf. article 40, para. 4, and article 30, para. 4, of the Vienna Conventions.

[402] Cf. article 41 of the Vienna Conventions.

[403] See paras. (19) to (23) of the present commentary.

[404] See para. (4) of the present commentary.

[405] Cf. article 57 (a) (Suspension of a treaty under its provisions) and article 44 of the two Conventions on "separability of treaty provisions". See Paul Reuter, "Solidarité et divisibilité des engagements conventionnels" in Y. Dinstein, ed., *International Law at a Time of Perplexity – Essays in Honour of Shabtai Rosenne* (Dordrecht, Nijhoff, 1989), pp. 623–634, also reproduced in Paul Reuter, *Le développement de l'ordre juridique international – Écrits de droit international* (Paris, Économica, 1995), pp. 361–374.

[406] "A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it, or suspending its operation must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor."

[407] Article 72 of the Vienna Conventions.

[408] Certain reservations can be made only for a specific period; thus, Horn offers the example of ratification by the United States of the 1933 Montevideo Convention on Extradition, with the reservation that certain provisions thereof should not be applicable to the United States "... until subsequently ratified in accordance with the Constitution of the United States" (F. Horn, footnote 25 above, p. 100). And certain reservation clauses even impose such a provisional nature (cf. article 25, para. 1, of the 1967 European Convention on the adoption of children and

timing of their occurrence, which is necessarily subsequent to the entry into force of the treaty in respect of the author of the statement. Furthermore, the Vienna Conventions make such statements subject to a legal regime that differs clearly from the reservations regime.[409]

(11) The same applies when the suspension of the effect of the provisions of a treaty is the result of a notification made not, as in the case referred to above, under the rules of the general international law of treaties but on the basis of specific provisions in the treaty itself.[410] The identical approach taken when applying this method and that of reservations is noteworthy: "Both approaches appear to show little concern for the integrity of an international agreement, since they prefer a more universal application thereof. The option of formulating reservations is an element that is likely to promote more widespread acceptance of international treaties. Similarly, the fact that it is possible to release oneself or be released for a given period of time from one's international obligations is such as to encourage a hesitant State to enter finally into a commitment that offers it a number of advantages. There, however, the similarity between the two procedures ends."[411] In fact, in the case of a reservation, the partners of the reserving State or international organization are informed at the outset of the limits on the commitment of that State or organization, whereas, in the case of a declaration under an escape clause, the aim is to remedy unforeseeable difficulties arising from the application of the treaty.[412] There is therefore no likelihood of serious confusion between such notifications and reservations.

(12) Two other procedures that may also be considered alternatives to reservations purport (or may purport) to modify the effects of a treaty in respect of specific features of the situation of the parties: restrictive clauses and agreements whereby two or more States or international organizations purport, under a specific provision of a treaty, to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

(13) It would seem that everything but their purpose differentiates these procedures from reservations. They are purely conventional techniques which take the form not of unilateral statements, but of one or more agreements between the parties to a treaty or between some of them. Where restrictive clauses in the treaty, amendments that enter into force only for certain parties to the treaty or "bilateralization" procedures are concerned, however, problems may arise, if only because certain legal positions have been adopted which, in a most questionable manner, characterize such procedures as "reservations".

(14) There are countless restrictive clauses purporting to limit the purpose of obligations resulting from the treaty by introducing exceptions and limits, and they are to be found in

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article 14, para. 2, of the 1975 European Convention on the legal status of children born out of wedlock, whose wording is identical: "A reservation shall be valid for five years from the entry into force of this Convention for the Contracting Party concerned. It may be renewed for successive periods of five years by means of a declaration addressed to the Secretary General of the Council of Europe before the expiration of each period"; or article 20 of The Hague Divorce Convention of 1 June 1970, which authorizes Contracting States which do not provide for divorce to reserve the right not to recognize a divorce, but whose paragraph 2 states: "This reservation shall have effect only so long as the law of the State utilizing it does not provide for divorce").

[409] Cf., in particular, articles 65, 67, 68 and 72.

[410] As indicated above (footnote 394), such exclusionary clauses fall into two categories: waivers and escape clauses.

[411] Aleth Manin, "À propos des clauses de sauvegarde", *Revue trimestrielle de droit européen*, 1970, p. 3.

[412] See para. (10) above. See also, in this connection, S. Spiliopoulou Åkermark, footnote 101 above, pp. 501–502.

treaties on a wide range of subjects, such as the settlement of disputes,[413] the safeguarding of human rights,[414] protection of the environment,[415] trade[416] and the law of armed conflicts.[417] Although such provisions are similar to reservations in their object,[418] the two procedures "operate" differently: in the case of restrictive clauses, there is a general exclusion arising out of the treaty itself; in the case of reservations, it is merely a possibility available to the States parties, permitted under the treaty, but becoming effective only if a unilateral statement is made at the time of accession.[419]

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[413] In addition to article 27 of the above-mentioned 1957 European Convention, see, for example, article 1 of the Franco-British Arbitration Agreement of 14 October 1903, which has served as a model for a great number of subsequent treaties: "Differences which may arise of a legal nature, or relating to the interpretation of Treaties existing between the two Contracting Parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of 29 July 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honour of the two Contracting States, and do not concern the interests of third Parties."

[414] Cf. the "clawback clauses" referred to above in footnote 392. For example (again, there are innumerable examples), article 4 of the International Covenant on Economic, Social and Cultural Rights of 1966: "The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

[415] Cf. article VII ("Exemptions and other special provisions relating to trade") of the Convention of 3 March 1973 on International Trade in Endangered Species of Wild Fauna and Flora, or article 4 ("Exceptions") of the Lugano Convention of 21 June 1993 on Civil Liability for Damage Resulting from Activities Dangerous to the Environment or article 4 of the Stockholm Convention on Persistent Organic Pollutants of 22 May 2001 ("Register of specific exemptions").

[416] Cf. article XII ("Restrictions to safeguard the balance of payments"), article XIV ("Exceptions to the rule of non-discrimination"), article XX ("General exceptions") or article XXI ("Security exceptions") of the 1947 General Agreement on Tariffs and Trade.

[417] Cf. article 5 of the Geneva Conventions of 12 August 1949 ("Derogations"), article 9 of the Convention relating to the Status of Refugees of 22 April 1954 ("Provisional measures").

[418] Imbert gives two examples that highlight this fundamental similarity, by comparing article 39 of the revised General Act of Arbitration of 28 April 1949 with article 27 of the European Convention of 29 April 1957 for the peaceful settlement of disputes (P.-H. Imbert, footnote 25 above, p. 10): under article 39, paragraph 2, of the General Act, reservations that are exhaustively enumerated and "must be indicated at the time of accession ... may be such as to exclude from the procedure described in the present act: (a) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said Party may have a dispute; (b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States". Meanwhile, article 27 of the 1957 Convention reads: "The provisions of this Convention shall not apply to: (a) Disputes relating to facts or situations prior to the entry into force of this Convention as between the Parties to the dispute; (b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States." Article 39 of the 1949 General Act of Arbitration is a reservation clause; article 27 of the 1957 Convention is a restrictive clause. There are striking similarities: in both cases, the aim is to exclude identical types of disputes from methods of settlement provided for by the treaty in question.

[419] In the preceding example, therefore, it is not entirely accurate to assert, as Imbert does, that "in practice, article 27 of the European Convention produces the same result as a reservation in respect of the General Act" (*ibid.*, p. 10). This is true only of the reserving State's relations with other parties to the General Act and not of such other parties' relations among themselves, to which the treaty applies in its entirety.

(15) At first glance, there would appear to be no likelihood of confusion between such restrictive clauses and reservations. However, not only is language usage deceptive and "such terms as 'public order reservations', 'military imperatives reservations', or 'sole competence reservations' [are] frequently encountered",[420] yet there is still an unwarranted degree of confusion. For example, in an often quoted passage[421] from the dissenting opinion that he appended to the Judgment of the International Court of Justice rendered on 1 July 1952 in the *Ambatielos (Preliminary objection)* case, Judge Zoričić stated the following:

> "A reservation is a provision agreed upon between the parties to a treaty with a view to restricting the application of one or more of its clauses or to clarifying their meaning."[422]

(16) Guideline 1.7.1 refers to restrictive clauses both as a warning against this frequent confusion and as an indication that they are a possible alternative to reservations.

(17) The reference to agreements, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves is made for the same reasons. For example, the European Union and its member States have inserted in multilateral treaties so-called "disconnection clauses" on the basis of which they purport to exclude the application of the treaty in their relations with one another, which continue to be governed by European Union law.[423]

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[420] P.-H. Imbert, *ibid.*, p. 10. For an example of a "public order reservation", see the first paragraph of article 6 of the Havana Convention of 20 February 1928 regarding the Status of Aliens in the respective Territories of the Contracting Parties: "For reasons of public order or safety, States may expel foreigners domiciled, resident, or merely in transit through their territory." For an example of a "sole competence reservation", see article 3, paragraph 11, of the United Nations Convention of 20 December 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: "Nothing contained in this article [on 'offences and sanctions'] shall affect the principle that the description of the offences to which it refers and of legal defences thereto is reserved to the domestic law of a party and that such offences shall be prosecuted and punished in conformity with that law."

[421] Cf. Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points", *The British Year Book of International Law*, 1957, pp. 272–273; however, although he quotes this definition with apparent approval, this distinguished author departs from it considerably in his commentary.

[422] *I.C.J. Reports 1952*, p. 76. For another example, see Georges Scelle, *Précis de droits des gens (Principes et systématiques)*, vol. 2 (Paris, Sirez, 1934), p. 472.

[423] See, for example, article 26, paragraph 3, of the 2005 Council of Europe Convention on the Prevention of Terrorism: ("Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.") or article 40, paragraph 3, of the 2005 Council of Europe Convention on Action against Trafficking in Human Beings; article 53, paragraph 3, of the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism and article 54 *ter*, paragraph 1, of the Lugano Convention (Convention on jurisdiction and the enforcement of judgments in civil and commercial matters). See also CJCE, Assemblée plénière, avis consultatif 1/03, 7 June 2006, *Recueil de la jurisprudence de la Cour de justice et du Tribunal de première instance 2006*, p. I-1145 (points 78–85); see also Committee of Legal Advisers on Public International Law (CAHDI), *Report on the consequences of the so-called "disconnection clause" in international law in general and for Council of Europe conventions containing such a clause in particular*, Council of Europe Committee of Ministers, document CM (2008)164,

(18) While it would not appear to be necessary to dwell on another treaty procedure that would make for flexibility in the application of a treaty, which consists of amendments (and additional protocols) that enter into effect only as between certain parties to a treaty,[424] it does seem necessary to consider certain specific agreements which are concluded between two or more States parties to basic treaties, which purport to produce the same effects as reservations and in connection with which reference has been made to the "bilateralization" of "reservations".

(19) The bilateralization regime has been described as permitting "contracting States, while being parties to a multilateral convention, to choose the partners with which they will proceed to implement the regime provided for".[425] It can be traced back to article XXXV, paragraph 1, of the 1947 General Agreement on Tariffs and Trade.[426] The general approach involved in

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27 October 2008; Constantin P. Economides and Alexandros G. Kolliopoulos, "La clause de déconnexion en faveur du droit communautaire: une pratique critiquable", *R.G.D.I.P.*, vol. 110, 2006, pp. 273–302, or Magdalena Ličková, "The European Exceptionalism in International Law", *European Journal of International Law*, vol. 19, No. 3, 2008, pp. 463–490.

[424] This procedure, which is provided for in article 40, paragraphs 4 and 5 (and article 30, paragraph 4), and article 41 of the 1969 and 1986 Vienna Conventions, is applied as a matter of routine. Even if, in terms of its general approach and as regards some aspects of its legal regime (respect for the fundamental characteristics of the treaty, though it does not contain a reference to its "object and purpose"), it is similar to procedures that characterize reservations, it is nonetheless very different in many respects:

- the flexibility it achieves is not the product of a unilateral statement by a State, but of agreement between two or more parties to the initial treaty;
- such agreement may be reached at any stage, generally following the treaty's entry into effect for its parties, which is not so in the case of reservations that must be formulated at the time of the expression of consent to be bound, at the latest; and
- there is no question here of "excluding or modifying the legal effect of certain provisions of the treaty in their application", but in fact of modifying the provisions in question themselves;
- moreover, whereas reservations can only limit their author's treaty obligations or make provision for equivalent ways of implementing a treaty, amendments and protocols can have the effect of both extending and limiting the obligations of States and international organizations parties to a treaty. Since there is no fear of confusion in the case of reservations, no clarification is called for and it would appear unnecessary to mention expressly in guideline 1.7.1 a distinction which is already quite clear.

[425] M.H. Van Hoogstraten, "*L'état présent de la Conférence de La Haye de Droit International Privé*", in *The Present State of International Law and other Essays Written in honour of Centenary Celebration of the International Law Association 1873–1973* (Netherlands, Kluwer, 1973), p. 387.

[426] "This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if (a) the two contracting parties have not entered into tariff negotiations with each other, and (b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application." See P.-H. Imbert, footnote 25 above, p. 199. The practice of "lateral agreements" (cf. Dominique Carreau and Patrick Juillard, *Droit international économique* (Paris, Libraire générale de droit et de jurisprudence, 1998), pp. 54–56 and 127) has accentuated this bilateralization. See also article XIII of the Agreement Establishing the World Trade Organization or certain conventions adopted at The Hague Conference on Private International Law: for example, article 13, paragraph 4, of the Companies Convention of 1 June 1956, article 12 of the Legalization Convention of 5 October 1961, article 31 of the Maintenance-enforcement Convention of 2 October 1973, article 42 of the Administration of Estates Convention of 2 October 1973, article 44, paragraph 3, of The Hague Convention of 29 May 1993 on Protection of Children and Cooperation in respect of Intercountry Adoption, article 58, paragraph 3, of The Hague

this procedure is not comparable to the approach on which the reservations method is based; it allows a State to exclude, by means of its silence or by means of a specific declaration, the application of a treaty as a whole in its relations with one or more other States and not to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain aspects. It is more easily compared to statements of non-recognition, where such statements purport to exclude the application of a treaty between a declaring State and the non-recognized entity.[427]

(20) However, the same is not true when bilateralization involves an agreement to derogate from a treaty concluded among certain parties in application of treaty provisions expressly authorizing this, as can be seen in the Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters, adopted on 1 February 1971 within the framework of The Hague Conference on Private International Law. It was in fact during the elaboration of this Convention that the doctrine of "bilateralization of reservations" was elaborated.

(21) However, in response to a Belgian proposal, the 1971 Enforcement Convention goes further than these traditional bilateralization methods. Not only does article 21 of this instrument make the Convention's entry into effect with respect to relations between two States subject to the conclusion of a supplementary agreement,[428] but it also permits the two States to modify their commitment *inter se* within the precise limits set in article 23:[429]

> "In the Supplementary Agreements referred to in article 21 the Contracting States may agree: ..."

This is followed by a list of 23 possible ways of modifying the Convention, the purposes of which, as summarized in the explanatory report of C.N. Fragistas, are:

> "1. *To clarify a number of technical expressions used by the Convention* whose meaning may vary from one country to another (art. 23 of the Convention, items Nos. 1, 2, 6 and 12);
>
> 2. *To include within the scope of the Convention matters that do not fall within its scope* (art. 23 of the Convention, items Nos. 3, 4 and 22);
>
> 3. *To apply the Convention in cases where its normal requirements have not been met* (art. 23 of the Convention, items Nos. 7, 8, 9, 10, 11, 12 and 13);

Convention of 19 October 1996 concerning competence, applicable law, recognition, execution and cooperation in matters relating to parental responsibility and measures for the protection of children, article 54, paragraph 3, of the Convention of 2 October 1999 on the international protection of adults or article 37 of the European Convention of 16 May 1972 on State Immunity, adopted in the context of the Council of Europe: "3. ... if a State having already acceded to the Convention notifies the Secretary General of the Council of Europe of its objection to the accession of another non-member State, before the entry into force of this accession, the Convention shall not apply to the relations between these two States".

[427] Cf. guideline 1.5.1 and paras. (5) to (9) of commentary thereto.

[428] "Decisions rendered in a Contracting State shall not be recognized or enforced in another Contracting State in accordance with the provisions of the preceding Articles unless the two States, being Parties to this Convention, have concluded a Supplementary Agreement to this effect."

[429] The initial Belgian proposal did not envisage this modification possibility, which was established subsequently as the discussions progressed (cf. P. Jenard, "Une technique originale: La bilatéralisation de conventions multilatérales", *Belgian Review of International Law* 1966, pp. 392–393).

> 4. *To exclude the application of the Convention in respect of matters normally covered by it* (art. 23 of the Convention, item No. 5);
>
> 5. *To declare a number of provisions inapplicable* (art. 23 of the Convention, item No. 20);
>
> 6. *To make a number of optional provisions of the Convention mandatory* (art. 23 of the Convention, items Nos. 8 *bis* and 20);
>
> 7. *To regulate issues not settled by the Convention or adapt a number of formalities required by it to domestic legislation* (art. 23 of the Convention, items Nos. 14, 15, 16, 17, 18 and 19)."[430]

Undoubtedly, many of these alternatives "simply permit States to define words or to make provision for procedures";[431] however, a number of them restrict the effect of the Convention and have effects very comparable to those of reservations, which they nevertheless are not.[432]

(22) The 1971 Enforcement Convention is not the only treaty that makes use of this procedure of pairing a basic convention and a supplementary agreement, thus permitting the introduction to the convention of alternative contents, even though the convention is a typical example and probably a more refined product. Reference may also be made, *inter alia*, to:[433]

- article 20 of The Hague Convention of 15 November 1965 on the service of judicial documents, which permits contracting States to "agree to dispense with" a number of provisions;[434]
- article 34 of the Convention of 14 June 1974 on the Limitation Period in the International Sale of Goods;[435]
- articles 26, 56 and 58 of the European Convention of 14 December 1972 on social security, which with similar wording states:

> "The application [of certain provisions] as between two or more Contracting Parties shall be subject to the conclusion between those Parties of bilateral or multilateral agreements which may also contain appropriate special arrangements";

or, for more recent examples:

- article 39, paragraph 2, of The Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption:

> "Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21. The States which have

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[430] Conférence de la Haye, *Actes et documents de la session extraordinaire*, 1966, p. 364 – emphasis in the original text. See also Georges A.L. Droz, "Le récent projet de Convention de La Haye sur la reconnaissance et l'exécution des jugements étrangers en matière civile et commerciale", *Netherlands International Law Review*, 1966, p. 240.

[431] P.-H. Imbert, footnote 25 above, p. 200.

[432] *Contra* P.-H. Imbert, *ibid.*

[433] These examples have been borrowed from P.-H. Imbert, footnote 25 above, p. 201.

[434] But the application of this provision does not depend on the free choice of partner; see P.-H. Imbert, *ibid.*; see also G. Droz, footnote 109 above, pp. 390–391. In fact, this procedure bears a resemblance to amendments between certain parties to the basic convention alone.

[435] The same remark applies to this provision.

concluded such an agreement shall transmit a copy to the depositary of the Convention";[436]

or

- article 5 (Voluntary extension) of the Helsinki Convention of 17 March 1992 on the Transboundary Effects of Industrial Accidents:

> "Parties concerned should, at the initiative of any of them, enter into discussions on whether to treat an activity not covered by Annex I as a hazardous activity ... Where the parties concerned so agree, this Convention, or any part thereof, shall apply to the activity in question as if it were a hazardous activity."

(23) These options, which permit parties concluding a supplementary agreement to exclude the application of certain provisions of the basic treaty or not to apply certain provisions thereof, either as a general rule or in particular circumstances, do indeed purport to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects, in their application to the two parties bound by the agreement. However, and this is a fundamental difference from true reservations, such exclusions or modifications are not the product of a unilateral statement, which constitutes an essential element of the definition of reservations,[437] but, rather, an agreement between two of the parties to the basic treaty that does not affect the other contracting States and contracting organizations to the treaty. "The system leads to the elaboration of two instruments: a multilateral convention, on the one hand, and a supplementary agreement, on the other, which, although based on the multilateral convention, nevertheless has an independent existence."[438] The supplementary agreement is, so to speak, an instrument that is a prerequisite not for the entry into force of the treaty but for ensuring that the treaty has effects on the relations between the two parties concluding the agreement, since its effects will otherwise be diminished (and it is in this respect that its similarity to the reservations procedure is particularly obvious) or increased. However, its treaty nature precludes any equation with reservations.

(24) It is such agreements, which have the same object as reservations and which are described, frequently but misleadingly, as "bilateralized reservations", that are the subject of the second subparagraph of guideline 1.7.1.

1.7.2 Alternatives to interpretative declarations

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

- the insertion in the treaty of provisions purporting to interpret the treaty;

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[436] Once again, one cannot truly speak of bilateralization in the strict sense since this provision does not call for the choice of a partner. Also see article 52 of the draft Hague convention of 19 October 1996 concerning competence, applicable law, recognition, execution and cooperation in matters relating to parental responsibility and measures relating to protection of children, or article 49 of The Hague Convention of 2 October 1999 on international protection of adults.

[437] Cf. guideline 1.1: "'Reservation' means *a unilateral statement* ...".

[438] P. Jenard, *Rapport du Comité restreint sur la bilatéralisation*, Conférence de La Haye, *Actes et documents de la session extraordinaire*, 1966, p. 145. See also the explanatory report by C.N. Fragistas, *ibid.*, pp. 363–364, or G. Droz, footnote 109 above, p. 391.

- the conclusion of a supplementary agreement to the same end, simultaneously or subsequently to the conclusion of the treaty.

Commentary

(1) Just as reservations are not the only means at the disposal of contracting States and organizations for modifying the application of the provisions of a treaty, interpretative declarations are not the only procedure by which States and international organizations can specify or clarify their meaning or scope. Leaving aside the third-party interpretation mechanisms provided for in the treaty,[439] the variety of such alternative procedures in the area of interpretation is nonetheless not as great. Two procedures of this type can be mentioned by way of example.

(2) In the first place, it is very often the case that the treaty itself specifies the interpretation to be given to its own provisions. Such is the primary purpose of the clauses containing the definition of the terms used in the treaty.[440] Moreover, it is very common for a treaty to provide instructions on how to interpret the obligations imposed on the parties either in the body of the treaty itself[441] or in a separate instrument.[442]

(3) Secondly, the parties, or some of them,[443] may conclude an agreement for the purposes of interpreting a treaty previously concluded between them. This possibility is expressly envisaged in article 31, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, which requires the taking into account, together with the context, of:

> "(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions".

(4) Moreover, it may happen that the interpretation is "bilateralized".[444] This occurs when a multilateral convention relegates to bilateral agreements the task of clarifying the meaning or scope of certain provisions. Thus, article 23 of the Hague Conference Convention of 1971 on the recognition and enforcement of foreign judgements in civil and commercial matters provides that contracting States shall have the option of concluding supplementary agreements in order, *inter alia*:

> "1. To clarify the meaning of the expression 'civil and commercial matters', to determine the courts whose decisions shall be recognized and enforced under this Convention, to define the expression 'social security' and to define the expression 'habitual residence';

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[439] Cf. D. Simon, footnote 166 above, p. 936.

[440] Cf., among countless examples, article 2 of the 1969 and 1986 Vienna Conventions or article XXX of the Statutes of the International Monetary Fund.

[441] Cf., again among countless examples, article 13, paragraph 4, of the International Covenant on Economic, Social and Cultural Rights: "No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, ...".

[442] Cf. "Notes and supplementary provisions" to the GATT of 1947. This corresponds to the possibility envisaged in article 30, paragraph 2, of the 1969 and 1986 Vienna Conventions.

[443] Where all the parties to the interpretative agreement are also parties to the original treaty, the interpretation is authentic (see the final commentary of the International Law Commission on article 27, paragraph 3 (a), of the draft articles on the law of treaties, which became article 30, paragraph 3 (a), of the Vienna Convention of 1969: *Yearbook ..., 1966*, vol. II, p. 241, para. 14); cf., with regard to bilateral treaties, guideline 1.6.3).

[444] On the "bilateralization" of reservations, see guideline 1.7.1 and paras. (18) to (23) of commentary thereto.

> 2. To clarify the meaning of the term 'law' in States with more than one legal system; ...".[445]

(5) It therefore seemed desirable to include in the Guide to Practice a provision on alternatives to interpretative declarations, if only for the sake of symmetry with guideline 1.7.1 on alternatives to reservations. On the other hand, it does not appear necessary to devote a separate guideline to the enumeration of alternatives to conditional interpretative declarations:[446] the alternative procedures listed above are treaty-based and require the agreement of the contracting States and contracting organizations. It matters little, then, whether or not the agreed interpretation constitutes the *sine qua non* of their consent to be bound.

1.8 Scope of definitions

The definitions of unilateral statements included in the present Part are without prejudice to the validity and legal effects of such statements under the rules applicable to them.

Commentary

(1) Defining is not the same as regulating. The sole function of a definition is to determine the general category in which a given statement should be classified. However, such classification does not in any way prejudge the validity of the statements in question: a reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established. *A contrario*, it is not a reservation if it does not meet the criteria set forth in these guidelines, but this does not necessarily mean that such statements are valid (or invalid) from the standpoint of other rules of international law. The same is true of interpretative declarations, which might conceivably not be valid either because they would alter the nature of the treaty or because they were not formulated at the required time,[447] etc.[448]

(2) Furthermore, the exact determination of the nature of a statement is a precondition for the application of a particular legal regime and, above all, for the assessment of its validity. It is only once a particular instrument has been defined as a reservation (or an interpretative declaration, either simple or conditional) that one can decide whether it is valid, evaluate its legal scope and determine its effect. However, this validity and these effects are not otherwise affected by the definition, which requires only that the relevant rules be applied.

(3) For example, the fact that a reservation was formulated "when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty" (in keeping with the wording of guideline 1.1, paragraph 1) does not mean that such a reservation is necessarily valid; its validity depends upon whether it meets the conditions stipulated in the law on reservations to treaties and, in particular, those stipulated in article 19 of the 1969 and 1986 Vienna Conventions. Similarly, the Commission's confirmation of the well-established practice of "across-the-board"

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[445] On this provision, see paras. (20) and (21) of the commentary to guideline 1.7.1.

[446] See guideline 1.4.

[447] This problem may very likely arise in connection with conditional interpretative declarations (see guideline 1.4).

[448] The same may obviously be said about unilateral statements which are neither reservations nor interpretative declarations, referred to in section 1.5.

reservations in guideline 1.1, paragraph 2, is in no way meant to constitute a decision on the validity of such a reservation in a specific case, which would depend on its contents and context; the sole purpose of the draft is to show that a unilateral statement of this nature is indeed a reservation and as such subject to the legal regime governing reservations.

(4) The "rules applicable" referred to in guideline 1.8 are, first of all, the relevant rules in the 1969, 1978 and 1986 Vienna Conventions and, in general, the customary rules applicable to reservations and to interpretative declarations, which this Guide to Practice is intended to codify and develop progressively in accordance with the Commission's mandate, and those relating to other unilateral statements which States and international organizations may formulate in respect of treaties but which are not covered in the Guide to Practice.

(5) More generally, all the guidelines contained in the Guide to Practice are interdependent and cannot be read and understood in isolation from one another.

2. Procedure

2.1 Form and notification of reservations

2.1.1 Form of reservations

A reservation must be formulated in writing.

Commentary

(1) Under article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions, a reservation "must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty". Guideline 2.1.1 covers the first of these requirements; the second is dealt with in guideline 2.1.5.

(2) Although it is not included in the actual definition of a reservation[449] and the word "statement", which is included, refers to both oral and written statements, the need for a reservation to be in writing was never called into question during the *travaux préparatoires* for the Vienna Conventions.[450] The Commission's final commentary on what was then the first paragraph of draft article 18 and was to become, without any change in this regard, article 23, paragraph 1, of the 1969 Vienna Convention, presents it as self-evident that a reservation must be in writing.[451]

(3) That was the opinion expressed in 1950 by J.L. Brierly, who, in his first report, suggested the following wording for article 10, paragraph 2:

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[449] Cf. guideline 1.1, which combines the definitions in article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions and article 2, paragraph 1 (j), of the 1978 Convention; see *Yearbook of the International Law Commission, 1998*, vol. II (Part Two), pp. 99–100.

[450] See also Alain Pellet and William Schabas, "*Commentaire de l'article 23 (1969)*" in O. Corten and P. Klein (dirs.), *Les Conventions de Vienne sur le droit des traités* ..., vol. I, footnote 30 above, pp. 978, para. 16; Alain Pellet and William Schabas, 1969 Vienna Convention Article 23, in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties* ..., vol. I, footnote 30 above, p. 598, para. 16.

[451] See *Yearbook ... 1966*, vol. II, p. 208.

> "Unless the contrary is indicated in a treaty, the text of a proposed reservation thereto must be authenticated together with the text or texts of that treaty or otherwise formally communicated in the same manner as an instrument or copy of an instrument of acceptance of that treaty."[452]

(4) This suggestion elicited no objections (except to the word "authenticated") during the discussions in 1950,[453] but the question of the form that reservations should take was not considered again until the first report by Fitzmaurice in 1956; under draft article 37, paragraph 2, which he proposed and which is the direct precursor of current article 23, paragraph 2,

> "Reservations must be formally framed and proposed in writing, or recorded in some form in the minutes of a meeting or conference ...".[454]

(5) In 1962, following the first report by Sir Humphrey Waldock,[455] the Commission elaborated on this theme:

> "Reservations, which must be in writing, may be formulated:
>
> (i) Upon the occasion of the adoption of the text of the treaty, either on the face of the treaty itself or in the final act of the conference at which the treaty was adopted, or in some other instrument drawn up in connection with the adoption of the treaty;
>
> (ii) Upon signing the treaty at a subsequent date; or
>
> (iii) Upon the occasion of the exchange or deposit of instruments of ratification, accession, acceptance or approval, either in the instrument itself or in a *procès-verbal* or other instrument accompanying it."[456]

This provision was hardly discussed by the members of the Commission.[457]

(6) In conformity with the position of two Governments,[458] which had suggested "some simplification of the procedural provisions",[459] Sir Humphrey Waldock made a far more restrained drafting proposal on second reading, namely:

> "A reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the other interested States."[460]

This draft is the direct source of article 23, paragraph 1, of the Vienna Conventions.

(7) While the wording was changed, neither the Commission[461] nor the Vienna Conference of 1968–1969[462] ever called into question the need for reservations to be

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[452] First report on the law of treaties, *Yearbook ... 1950*, vol. II, p. 239.

[453] *Yearbook ... 1950*, vol. I, 53rd meeting, 23 June 1950, pp. 91–92.

[454] *Yearbook ... 1956*, vol. II, p. 115.

[455] *Yearbook ... 1962*, vol. II, p. 60.

[456] Draft article 18, para. 2 (a), *ibid.*, p. 176; for the commentary on this provision, see *ibid.*, p. 180; see also paragraphs (4) and (5) of the commentary to guideline 2.2.1.

[457] See the summary records of the 651st to 656th meetings (25 May–4 June 1962), *Yearbook ... 1962*, vol. I, pp. 155–195. See, however, the remarks of Mr. Castrén (652nd meeting, 28 May 1962, *ibid.*, p. 148) and Sir Humphrey Waldock (656th meeting, 4 June 1962, *ibid.*, p. 175); see also paragraph (8) below.

[458] Denmark and Sweden (cf. the fourth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, pp. 46 and 47).

[459] *Ibid.*, p. 53, para. 13.

[460] Draft article 20, para. 1, *ibid.*; para. 13, p. 56.

[461] See the final draft text in *Yearbook ... 1966*, vol. II, p. 208 (draft article 18, para. 1).

formulated in writing. And neither Reuter, Special Rapporteur on the law of treaties between States and international organizations or between two or more international organizations, nor the participants in the Vienna Conference of 1986 added clarifications or suggested any changes in this regard. The *travaux préparatoires* thus show remarkable unanimity in this respect.

(8) This is easily explained. It has been written that: "Reservations are formal statements. Although their formulation in writing is not embraced by the term of the definition, it would according to article 23 (1) of the Vienna Convention seem to be an absolute requirement. It is less common nowadays that the various acts of consenting to a treaty occur simultaneously, therefore it is not possible for an orally presented reservation to come to the knowledge of all contracting States and contracting organizations. In the era of differentiated treaty-making procedures it becomes essential for reservations to be put down in writing in order to be registered and notified by the depository, so that all interested States would become aware of them. A reservation not notified cannot be acted upon. Other States would not be able to expressly accept or object to such reservations."[463]

(9) Nonetheless, during the 1962 discussions, Sir Humphrey Waldock, replying to a question raised by Mr. Tabibi, did not totally exclude the idea of "oral reservations". He thought, however, that the question "belonged rather to the question of reservations at the time of the adoption of the treaty, which was dealt with in paragraph 2 (a) (i)" and that, in any case, the requirement of a formal confirmation "should go a long way towards disposing of the difficulty".[464]

(10) Ultimately, it hardly matters how reservations are formulated at the outset, if they must be formally confirmed at the moment of the definitive expression of consent to be bound. That is undoubtedly how article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions should be interpreted in the light of the *travaux préparatoires*: a reservation need be in writing only when formulated definitively, namely:

- When signing a treaty where the treaty makes express provision for this[465] or if signing is tantamount to definitive expression of consent to be bound (agreement in simplified form);[466] and
- In all other cases, where the State or international organization expresses its consent to be bound.[467]

(11) The Commission is nevertheless of the opinion that the question whether a reservation may initially be formulated orally can be left open. As Sir Humphrey Waldock so rightly pointed out,[468] the answer has no practical impact: a contracting party can in any event formulate a reservation up to the date of its expression of consent to be bound; thus, even if its initial oral statement could not be regarded as a true reservation, the "confirmation" made in due course would serve as a formulation.

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[462] See the report of the Committee of the Whole (A/CONF.39/14) in *Documents of the Conference*, pp. 138–139, paras. 190–196.

[463] F. Horn, footnote 25 above, p. 44; see also Liesbeth Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?* (Dordrecht Martinus Nijhoff, 1994), p. 50.

[464] *Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, para. 34, p. 223. See also a remark made by Brierly in 1950: "Mr. Brierly agreed that a reservation must be presented formally, but it might be announced informally during negotiations" (*Yearbook ... 1950*, vol. I, p. 91, para. 19).

[465] See guideline 2.2.3.

[466] See guideline 2.2.2.

[467] See guideline 2.2.1.

[468] See paragraph (8) above.

2.1.2 Statement of reasons for reservations

A reservation should, to the extent possible, indicate the reasons why it is being formulated.

Commentary

(1) Neither the Commission's work on the law of treaties nor the 1969 and 1986 Vienna Conventions establish any requirement that a State or international organization that formulates a reservation must give its reasons for doing so or explain why it considered it necessary to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects. Thus, giving reasons is not an additional condition for validity under the Vienna regime.

(2) However, some conventional instruments require States to give reasons for their reservations and to explain why they are formulating them. A particularly clear example is article 57 (former article 64) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which states:

> "1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
>
> 2. Any reservation made under this article shall contain a brief statement of the law concerned."

Under this regime, which is unquestionably *lex specialis* with respect to general international law, indication of the law on which the reservation is based is a genuine condition for the validity of any reservation to the European Convention. In the famous *Belilos* case, the European Court of Human Rights decided that article 57 (former article 64), paragraph 2, establishes "not a purely formal requirement but a condition of substance".[469] In the Court's view, the required reasons or explanations "provide a guarantee — in particular for the other Contracting Parties and the Convention institutions — that a reservation does not go beyond the provisions expressly excluded by the State concerned".[470] The penalty for failure to meet this requirement to give reasons (or to explain) is the invalidity of the reservation.[471]

(3) Even though under general international law such a drastic consequence clearly cannot follow automatically from a failure to give reasons, the justification for and usefulness of giving reasons for reservations, stressed by the European Court in 1988, can be applied with respect to all treaties and all reservations. It was for this reason that the Commission deemed it useful to encourage giving reasons without expressing it as a legal obligation to do so. The non-binding formulation of the guideline, reflected in the use of the conditional, makes it clear that this formality, while desirable, is in no way a legal obligation.

(4) Giving reasons (which is thus optional) is not an additional requirement that would make it more difficult to formulate reservations; it is a useful way for both the author of the reservation and the other concerned States, international organizations or monitoring bodies to

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[469] *Belilos v. Switzerland* (application No. 10328/83), Judgment of 29 April 1988, *Reports of Judgments and Decisions of the European Court of Human Rights*, Series A, No. 132, para. 59.

[470] *Ibid.*

[471] *Ibid.*, para. 60.

fulfil their responsibilities effectively. It gives the author of the reservation an opportunity not only to explain and clarify the reasons why the reservation was formulated — including (but not exclusively) by indicating impediments under domestic law that may make implementation of the provision on which the reservation is based difficult or impossible — but also to provide information that will be useful in assessing the validity of the reservation. In this regard, it should be borne in mind that the author of a reservation is also responsible for assessing its validity.

(5) The reasons and explanations given by the author of a reservation also facilitate the work of the bodies having competence to assess the reservation's validity, including other concerned States or international organizations, dispute settlement bodies responsible for interpreting or implementing the treaty and treaty monitoring bodies. Giving reasons, then, is also one of the ways in which States and international organizations making a reservation can cooperate with the other contracting States and contracting organizations and the monitoring bodies so that the validity of the reservation can be assessed.[472] It is a central element of the reservations dialogue.

(6) Giving and explaining the reasons which, in the author's view, made it necessary to formulate the reservation also helps to establish a fruitful reservations dialogue among the author of the reservation, the contracting States and international organizations and the monitoring body, if any. This is beneficial not only for the States or international organizations which are called upon to comment on the reservation by accepting or objecting to it, but also for the author of the reservation, which, by giving reasons, can help allay any concerns that its partners may have regarding the validity of its reservation and steer the reservations dialogue towards greater mutual understanding.

(7) In practice, reasons are more likely to be given for objections than for reservations. There are, however, examples in State practice of cases in which States and international organizations have made a point of giving their reasons for formulating a particular reservation. Sometimes, they do so purely for reasons of convenience, in which case their explanations are of no particular use in assessing the value of the reservation except perhaps insofar as they establish that it is motivated by such considerations of convenience.[473] But often the explanations that accompany reservations shed considerable light on the reasons for their formulation. For example, Barbados justified its reservation to article 14 of the International Covenant on Civil and Political Rights by practical problems of implementation:

> "The Government of Barbados states that it reserves the right not to apply in full, the guarantee of free legal assistance in accordance with paragraph 3 (d) of article 14 of the Covenant, since, while accepting the principles contained in the same

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[472] The Commission stressed this obligation to cooperate with monitoring bodies in its 1997 preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, paragraph 9 of which states: "The Commission calls upon States to cooperate with monitoring bodies ..." (*Yearbook ... 1997*, vol. II, Part Two, p. 58). This obligation to cooperate was also stressed by the international human rights treaty bodies in 2007 at their sixth inter-committee meeting (see the report of the meeting of the working group on reservations, HRI/MC/2007/5, para. 16 (Recommendations), recommendation No. 9 (a)).

[473] This is true of France's reservation to the European Agreement supplementing the Convention on Road Signs and Signals: "With regard to article 23, paragraph 3 *bis* (b), of the Agreement on Road Signs and Signals, France intends to retain the possibility of using lights placed on the side opposite to the direction of traffic, so as to be in a position to convey meanings different from those conveyed by the lights placed on the side appropriate to the direction of traffic" (*Multilateral Treaties ...*, chap. XI-B.24).

> paragraph, the problems of implementation are such that full application cannot be guaranteed at present."[474]

In another example (among the many precedents), the Congo formulated a reservation to article 11 of the Covenant, accompanying it with a long explanation:

> "The Government of the People's Republic of Congo declares that it does not consider itself bound by the provisions of article 11 [...]
>
> Article 11 of the International Covenant on Civil and Political Rights is quite incompatible with articles 386 *et seq.* of the Congolese Code of Civil, Commercial, Administrative and Financial Procedure, derived from Act 51/83 of 21 April 1983. Under those provisions, in matters of private law, decisions or orders emanating from conciliation proceedings may be enforced through imprisonment for debt when other means of enforcement have failed, when the amount due exceeds 20,000 CFA francs and when the debtor, between 18 and 60 years of age, makes himself insolvent in bad faith."[475]

(8) In the light of the obvious advantages of giving reasons for reservations and the role this practice plays in the reservations dialogue, the Commission chose not to stipulate in guideline 2.1.2 that reasons should accompany the reservation and be an integral part thereof — as is generally the case for reasons for objections[476] — but this is no doubt desirable, even though there is nothing to prevent a State or international organization from stating the reasons for its reservation *ex post facto*.

(9) Furthermore, although it seems wise to encourage the giving of reasons, this practice must not, in the Commission's view, become a convenient smokescreen used to justify the formulation of general or vague reservations. According to guideline 3.1.5.2 (Vague or general reservations), "[a] reservation shall be worded in such a way as to allow its meaning to be understood, in order to asses its compatibility with the object and purpose of the treaty". Giving reasons cannot obviate the need for the reservation to be formulated in terms that make it possible to assess its permissibility. Even without reasons, a reservation must be self-sufficient as a basis for assessment of its permissibility; the reasons can only facilitate this assessment.[477]

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[474] *Ibid.* (chap. IV.4). See also the Gambia's reservation (*ibid.*).

[475] *Ibid.* (chap. IV.4).

[476] See guideline 2.6.9 and commentary thereto. It is in any case extremely difficult to distinguish the reservation from the reasons for its formulation if they both appear in the same instrument.

[477] Nevertheless, there are cases in which the clarification resulting from the reasons given for the reservation might make it possible to consider a "dubious" reservation to be valid. For example, Belize accompanied its reservation to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances with the following explanation: "Article 8 of the Convention requires the parties to give consideration to the possibility of transferring to one another proceedings for criminal prosecution of certain offences where such transfer is considered to be in the interests of a proper administration of justice. The courts of Belize have no extra-territorial jurisdiction, with the result that they will have no jurisdiction to prosecute offences committed abroad unless such offences are committed partly within and partly without the jurisdiction, by a person who is within the jurisdiction. Moreover, under the Constitution of Belize, the control of public prosecutions is vested in the Director of Public Prosecutions, who is an independent functionary and not under Government control. Accordingly, Belize will be able to implement article 8 of the Convention only to a limited extent insofar as its Constitution and the law allows." (*Multilateral Treaties* ..., chap. VI.19). Without such an explanation, Belize's reservation might have been considered "vague or general" and might thus have fallen within the scope of guideline 3.1.5.2. Accompanied by this explanation, it appears much more defensible.

(10) Likewise, the fact that reasons may be given for a reservation at any time cannot be used by authors to modify or widen the scope of a reservation made previously. This is stipulated in guidelines 2.3.3 (Limits to the possibility of excluding or modifying the legal effect of a treaty by means other than reservations) and 2.3.4 (Widening of the scope of a reservation).

2.1.3 Representation for the purpose of formulating a reservation at the international level

1. Subject to the usual practices followed in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

(a) that person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(b) it appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State or the international organization for such purposes without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State for the purpose of formulating a reservation at the international level:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;

(b) representatives accredited by States to an international conference, for the purpose of formulating a reservation to a treaty adopted at that conference;

(c) representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted in that organization or organ;

(d) heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

Commentary

(1) Guideline 2.1.3 defines the persons and organs which are authorized, by virtue of their functions, to formulate a reservation on behalf of a State or an international organization. Its text is based closely on that of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[478]

(2) The two Vienna Conventions of 1969 and 1986 contain no particular explanation with regard to the persons and organs authorized to formulate a reservation at the international level. In his first report on the law of treaties in 1962, however, Sir Humphrey Waldock proposed a draft article which read:

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[478] Article 7 of the 1969 Vienna Convention on the Law of Treaties is drafted in much the same way, but, unlike the present Guide to Practice, it relates only to treaties between States.

"Reservations shall be formulated in writing either:

(i) On the face of the treaty itself and normally in the form of an adjunct to the signature of the representative of the reserving State;

(ii) In a Final Act of a conference, protocol, *procès-verbal* or other instrument related to the treaty and executed by a duly authorized representative of the reserving State;

(iii) In the instrument by which the reserving State ratifies, accedes to or accepts the treaty, or in a *procès-verbal* or other instrument accompanying the instrument of ratification, accession or acceptance and drawn up by the competent authority of the reserving State."[479]

(3) As Sweden noted with regard to the corresponding article adopted by the Commission on first reading,[480] such "procedural rules … would fit better into a code of recommended practices",[481] which is precisely the function of the Guide to Practice. The Commission has nevertheless concluded that it is not useful to include all of these clarifications in the present Guide: the long list of instruments in which reservations may appear does not add much, particularly since the list is not restrictive, as is indicated by the reference in two places to an instrument other than those expressly mentioned.

(4) Clarification is needed only with regard to the author of the instrument in question. The 1962 text is nevertheless not entirely satisfactory in this regard. The reservation must probably be formulated by "a representative of the reserving State" or by "the competent authority of the reserving State".[482] The question, however, is whether there are rules of general international law to determine in a restrictive manner which authority or authorities are competent to formulate a reservation at the international level or whether this determination is left to the domestic law of each State.

(5) In the opinion of the Commission, the answer to this question may be deduced both from the general framework of the Vienna Conventions and from the practice of States and international organizations in this area.

(6) By definition, a reservation has the purpose of modifying the legal effect of the provisions of a treaty in the relations between the parties; although it appears in an instrument other than the treaty, the reservation is therefore part of the corpus of the treaty and has a direct influence on the respective obligations of the parties. It leaves intact the *instrumentum* (or *instrumenta*) constituting the treaty, but it directly affects the *negotium*. In this situation, it seems logical and inevitable that reservations should be formulated under the same conditions as the consent of the State or international organization to be bound. And this is not an area in which international law is based entirely on domestic laws.

(7) Article 7 of the 1969 and 1986 Vienna Conventions contains precise and detailed provisions on this point which undoubtedly reflect positive law on the subject. In the words of the 1986 Convention:

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[479] Draft article 17, para. 3 (a), *Yearbook ... 1962*, vol. II, p. 60. In his commentary Waldock restricts himself to saying that this provision "does not appear to require comment" (*ibid.*, p. 66).

[480] Draft article 18, para. 2 (a), *ibid.*, p. 176.

[481] Fourth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, p. 47.

[482] See paragraph (2) above.

> "1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
>
> (a) That person produces appropriate full powers; or
>
> (b) It appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State for such purposes without having to produce full powers.
>
> "2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
>
> (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty (...);
>
> (b) Representatives accredited by States to an international conference, for the purpose of adopting the text of a treaty (...);
>
> (c) Representatives accredited by States to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that organization or organ;
>
> (d) Heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between the accrediting States and that organization.
>
> "3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty, or expressing the consent of that organization to be bound by a treaty if:
>
> (a) That person produces appropriate full powers; or
>
> (b) It appears from the circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the organization for such purposes, in accordance with the rules of the organization, without having to produce full powers."

(8) *Mutatis mutandis*, these rules, for the reasons indicated above, may certainly be transposed to the formulation of reservations, on the understanding, of course, that a reservation formulated by a person who cannot "be considered (...) as authorized to represent a State or an international organization for that purpose is without legal effect unless afterwards confirmed by that State or that organization".[483]

(9) Moreover, these restrictions on the representation of a State (or of an international organization) in the formulation of reservations at the international level have been broadly confirmed in practice.

(10) In an *aide-memoire* dated 1 July 1976, the United Nations Legal Counsel said:

> "A reservation must be formulated in writing (article 23, paragraph 1, of the [1969 Vienna] Convention), and both reservations and withdrawals of reservations must emanate from one of the three authorities (Head of State, Head of Government or Minister for Foreign Affairs) competent to bind the State internationally."[484]

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[483] Cf. article 8 of the 1969 and 1986 Vienna Conventions.

[484] *United Nations Juridical Yearbook*, 1976, p. 211, para. 7.

(11) Similarly, the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* prepared by the Treaty Section of the United Nations Office of Legal Affairs confines itself to noting that "the reservation must be included in the instrument or annexed to it and must emanate from one of the three qualified authorities" and to referring to general developments concerning the "deposit of binding instruments".[485] Likewise, according to this document, "Reservations made at the time of signature must be authorized by the full powers granted to the signatory by one of the three qualified authorities or the signatory must be one of these authorities".[486]

(12) These rules seem to be strictly applied; all the instruments of ratification (or equivalents) of treaties containing reservations for which the Secretary-General is depositary are signed by one of the "three authorities" or, if they are signed by the permanent representative, the latter has attached full powers emanating from one of these authorities. Moreover, where this is not the case, the permanent representative is requested, informally but firmly, to make this correction.[487]

(13) The Commission nevertheless questioned whether this practice, which transposes to reservations the rules contained in article 7 of the Vienna Conventions, referred to above,[488] is not excessively rigid. It may be considered, for example, whether it would be legitimate to accept that the accredited representative of a State to an international organization which is the depositary of the treaty to which the State that he represents wishes to make a reservation should be authorized to make that reservation. The issue is particularly relevant because this practice is accepted in international organizations other than the United Nations.

(14) It seems, for example, that the Secretary-General of the Organization of American States (OAS) and the Secretary-General of the Council of Europe accept reservations recorded in letters from permanent representatives.[489]

(15) One can also maintain that the rules applying to States should be transposed more fully to international organizations than they are in article 7, paragraph 2, of the 1986 Vienna Convention and, in particular, that the head of the secretariat of an international organization

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[485] ST/LEG/8, footnote 75 above, p. 49, para. 161; this passage refers to paras. 121 and 122, *ibid.*, p. 36.

[486] *Ibid.*, p. 62, para. 208; refers to chapter VI of the *Summary* ("Full powers and signatures").

[487] This is confirmed, by analogy, by the procedural incident between India and Pakistan that came before the International Court of Justice in the *Aerial Incident of 10 August 1999* case. Oral pleadings revealed that in an initial communication dated 3 October 1973, the Permanent Mission of Pakistan to the United Nations gave notification of that country's intent to succeed British India as a party to the General Act of Arbitration of 1928. In a note dated 31 January 1974, the Secretary-General requested that such notification should be made "in the form prescribed", in other words, that it should be transmitted by one of the three authorities mentioned above; this notification took the form of a new communication (formulated in different terms than that of the preceding year), dated 30 May 1974 and signed this time by the Pakistani Prime Minister (see the pleadings by Sir Elihu Lauterpacht on behalf of Pakistan, 5 April 2000, CR/2000/3, and by A. Pellet on behalf of India, 6 April 2000, CR/2000/4). While this episode concerned a notification of succession and not the formulation of reservations, it testifies to the great vigilance with which the Secretary-General applies the rules set forth above (para. (11)) with regard to the general expression by States of their consent to be bound by a treaty.

[488] Paragraph (7).

[489] Cf. the reply by OAS in "Depositary practice of States and international organizations in relation to reservations", report of the Secretary-General submitted pursuant to General Assembly resolution 1452 B (XIX), document A/5687, reproduced in *Yearbook ... 1965*, vol. II, p. 84. Cf. the *European Treaty Series*, No. 24 (http://conventions.coe.int).

or its accredited representatives to a State or another organization should be regarded as having competence *ipso facto* to bind the organization.

(16) One can legitimately maintain that the recognition of such limited extensions to competence for the purpose of formulating reservations would constitute a limited but welcome progressive development. The Commission, however, supported by a large majority of States, has consistently been careful not to change the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[490] Yet even if the provisions of article 7 of the 1969 and 1986 Conventions do not expressly deal with competence to formulate reservations, they are nonetheless rightfully[491] regarded as transposable to this case.

(17) By way of a compromise between these two requirements, the Commission adopted a sufficiently flexible guideline which, while referring to the rules in article 7, maintains the less rigid practice followed by international organizations other than the United Nations as depositaries.[492] The need for flexibility is reflected in the inclusion, at the beginning of guideline 2.1.3, of the expression "Subject to the customary practices in international organizations which are depositaries of treaties". This expression should, incidentally, be understood as applying both to the case where the international organization itself is the depositary and to the more usual case where this function is exercised by the organization's most senior official, the Secretary-General or the Director-General.

(18) It should also be noted that the expression "for the purposes of adopting or authenticating the text of the treaty", as contained in guideline 2.1.3, paragraph 1 (a), covers signature, since the two (alternative or joint) functions of signature are precisely the authentication of the text of the treaty (see article 10 of the Vienna Conventions) and the expression of consent to be bound by the treaty (art. 12).

2.1.4 Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations

1. The competent authority and the procedure to be followed at the internal level for formulating a reservation are determined by the internal law of each State or the relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations for the purpose of invalidating the reservation.

Commentary

(1) Guideline 2.1.3 relates to the formulation of reservations at the international level, while guideline 2.1.4 deals with their formulation in the internal legal system of States and international organizations.

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[490] Cf. *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487.

[491] See paragraph (6) above.

[492] See paragraph (14) above. The International Telecommunication Union (ITU) is also a special case in this regard, but in a different sense and for different reasons, since reservations to texts equivalent to treaties adopted by that body "can be formulated only by delegations, namely, *during conferences*" (reply by ITU to the Commission's questionnaire on reservations – emphasis in text).

(2) It is self-evident that the international phase of formulating reservations is only the tip of the iceberg; as is true of the entire procedure whereby a State or an international organization expresses its consent to be bound, it is the outcome of an internal process that may be quite complex. Like the ratification procedure (or the acceptance, approval or accession procedure), from which it is indissociable, the formulation of reservations is a kind of "internal parenthesis" within an overwhelmingly international process.[493]

(3) As Reuter has noted, "national constitutional practices with regard to reservations and objections change from one country to the next".[494] One can see, for example, that of the 23 States which replied to the Commission's questionnaire on reservations to treaties and whose answers to questions 1.7, 1.7.1, 1.7.2, 1.8, 1.8.1 and 1.8.2[495] are utilizable, competence to formulate a reservation belongs to: the executive branch alone in 6 cases;[496] the Parliament alone in 5 cases;[497] and it is shared between them in 12 cases.

(4) In this last hypothesis, there are various modalities for collaboration between the executive branch and the Parliament. In some cases, Parliament is merely kept informed of intended reservations[498] – although not always systematically.[499] In others, it must approve all reservations before their formulation[500] or, where only certain treaties are submitted to the Parliament, only those which relate to those treaties.[501] Moreover, a judicial body may be called upon to intervene in the internal procedure for formulating reservations.[502]

(5) It is interesting to note that the procedure for formulating reservations does not necessarily follow the one generally required for the expression of the State's consent to be bound. Thus, in France, it is only recently that the custom was established of transmitting to Parliament the text of reservations which the President of the Republic or the Government intends to attach to the ratification of treaties or the approval of agreements, even where such instruments must be submitted to Parliament under article 53 of the 1958 Constitution.[503]

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[493] Cf. P. Daillier, M. Forteau and A. Pellet, footnote 254 above, para. 85, pp. 160–161.

[494] P. Reuter, footnote 28 above, para. 133*, pp. 84–85.

[495] Question 1.7: "At the internal level, which authority or authorities decide(s) that the State will formulate a reservation: The Head of State? The Government or a government body? The Parliament?"; question 1.7.1: "If it is not always the same authority which has competence to decide that a reservation will be formulated, on what criteria is this based?"; question 1.7.2: "If the decision is taken by the Executive, is the Parliament: Informed of the decision? A priori or a posteriori? Invited to discuss the text of the intended reservation(s)?"; question 1.8: "Is it possible for a national judicial body to oppose or insist on the formulation of certain reservations?"; question 1.8.1: "If so, which authority and how is it seized of the matter?"; question 1.8.2: "What reason(s) can it invoke in taking such a decision?"

[496] Bolivia (the Parliament can suggest reservations), Colombia (for certain treaties), Croatia (the Parliament can oppose a proposed reservation, which would imply that it is consulted), Denmark, the Holy See and Malaysia. See also the States mentioned in footnotes 498 to 501 below.

[497] Colombia (for certain treaties), Estonia, San Marino, Slovenia and Switzerland (but the proposal is generally made by the Federal Council), unless the Federal Council has its own competence.

[498] Kuwait since 1994 (consultation of an ad hoc commission); New Zealand "until recently" (system provisionally established).

[499] France (if the rapporteurs of the Parliamentary Assemblies so request and as a mere "courtesy"), Israel, Japan (if the treaty does not contain a reservation clause), Sweden (the "outlines" of reservations are transmitted to Parliament, never their exact text).

[500] Argentina and Mexico.

[501] Finland, Republic of Korea, Slovakia and Spain.

[502] Colombia, Finland and Malaysia.

[503] Cf. Alain Pellet, commentary on article 53, in François Luchaire and G. Conac, eds., *La Constitution de la République française*, 2nd ed. (Paris, Economica, 1987), pp. 1047–1050.

(6) The diversity which characterizes the competence to formulate reservations and the procedure to be followed for that purpose among States seems to be mirrored among international organizations. Only two of them[504] answered questions 3.7, 3.7.1 and 3.7.2 of the questionnaire on reservations:[505] the Food and Agriculture Organization of the United Nations (FAO) stated that such competence belongs to the Conference, while the International Civil Aviation Organization (ICAO), while emphasizing the lack of real practice, held that if a reservation should be formulated on its behalf, it would be formulated by the Secretary-General as an administrative matter and, as the case may be, by the Assembly or the Council in their respective areas of competence,[506] with the stipulation that it would be "appropriate" for the Assembly to be informed of the reservations formulated by the Council or by the Secretary-General.

(7) In the view of the Commission, the only conclusion that can be drawn from these observations is that international law does not impose any specific rule with regard to the internal procedure for formulating reservations.

(8) However, the freedom of States and international organizations to determine the authority competent to decide that a reservation will be formulated and the procedure to be followed in formulating it raises problems similar to those arising from the same freedom the parties to a treaty have with respect to the internal procedure for ratification: what happens if the internal rules are not followed?

(9) In the 1986 Vienna Convention, article 46 on the "provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties" provides that:

> "1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.
>
> 3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith."

(10) In the absence of practice, it is difficult to take a categorical position on the transposition of these rules to the formulation of reservations. Some elements argue in its

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[504] This is explained by the fact that international organizations are parties to treaties much more rarely than States and that, where they are parties, they generally do not formulate reservations. Concerning the European Community, only the council has replied to the questionnaire.

[505] Question 3.7: "At the internal level, which organ(s) decide(s) that the organization will formulate a reservation: The chief executive officer? The general assembly? Another organ?"; question 3.7.1: "If it is not always the same organ that has competence to decide that a reservation will be formulated, on what criteria is this competence based?"; question 3.7.2: "If the decision is taken by the chief executive officer, is the general assembly: Informed of the decision? A priori or a posteriori? Invited to discuss the text of the intended reservation(s)?"

[506] Cf. articles 49 and 50 of the Chicago Convention on International Civil Aviation of 1944, which established ICAO.

favour: as discussed above,[507] the formulation of reservations cannot be dissociated from the procedure for expressing consent to be bound; it occurs or must be confirmed at the moment of expression of consent to be bound and, in almost all cases, emanates from the same authority. These arguments are, however, not decisive. Whereas the internal rules on competence to conclude treaties are often laid down in the constitution, at least in broad outline, that is usually not the case for the formulation of reservations, which mostly derives from general constitutional principles or practice. Such rules are not necessarily in line with those concerning the expression of consent to be bound.

(11) It is therefore unlikely that a violation of internal provisions can be "manifest" in the sense of article 46 of the Vienna Conventions cited above, and one is compelled to fall back on international rules such as those set forth in guideline 2.1.3. Consequently, a State or an international organization should not be allowed to claim that a violation of the provisions of internal law or of the rules of the organization has invalidated a reservation that it has formulated if such formulation was the act of an authority competent at the international level.

(12) Since this conclusion differs from the rules applicable to "defective ratification" as set forth in article 46, it seems essential to state it expressly in a guideline. This is the object of the second paragraph of guideline 2.1.4.

(13) One may wonder whether this provision is necessary, since the author of the reservation can always withdraw it "at any time".[508] However, since it is far from having been established that such withdrawal may have a retroactive effect, the question of the validity of a reservation formulated in violation of the relevant rules of internal law may arise in practice, thereby justifying the inclusion of the rule stated in the second paragraph of guideline 2.1.4.

2.1.5 Communication of reservations

1. A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

2. A reservation to a treaty in force which is the constituent instrument of an international organization must also be communicated to such organization.

Commentary

(1) Once it has been formulated, the reservation must be made known to the other States or international organizations concerned. Such publicity is essential for enabling them to react, either through an acceptance or an objection, or for promoting a reservations dialogue. Article 23 of the Vienna Conventions of 1969 and 1986 specifies the recipients of reservations formulated by a State or an international organization, but is silent on the procedure to be followed in effecting such notification. The object of guidelines 2.1.5 to 2.1.7 is to fill this gap, with guideline 2.1.5 referring more specifically to the recipients of the notification.

(2) Under article 23, paragraph 1, of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, a reservation must be communicated "to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty". In addition, article 20, paragraph 3, which stipulates that a reservation to a constituent instrument

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[507] Para. (2).

[508] Art. 22, para. 1, of the 1969 and 1986 Vienna Conventions.

requires "the acceptance of the competent organ" of the organization in order to produce effects, implies that the reservation must be communicated to the organization in question, as is stated in the second paragraph of guideline 2.1.5.

(3) The first group of recipients (contracting States and international organizations) does not pose any particular problem. These terms are defined in article 2, paragraph 1 (f), of the 1986 Convention[509] as meaning, respectively:

> "(i) a State, or
>
> (ii) an international organization,
>
> which has consented to be bound by the treaty, whether or not the treaty has entered into force".

(4) Much more problematic, in contrast, are the definition and, even more so, the determination in each specific case of the "other States and international organizations entitled to become parties to the treaty". As has been noted, "[n]ot all treaties are wholly clear as to which other States may become parties".[510]

(5) In his 1951 report on reservations to multilateral treaties, Brierly suggested the following provision:

> "The following classes of States shall be entitled to be consulted as to any reservations formulated after the signature of this convention (or after this convention has become open to signature or accession):
>
> "(a) States entitled to become parties to the convention,
>
> "(b) States having signed or ratified the convention,
>
> "(c) States having ratified or acceded to the convention."[511]

(6) In keeping with these recommendations, the Commission suggested that, "in the absence of contrary provisions in any multilateral convention (...) [t]he depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention".[512]

(7) More vaguely, Sir Hersch Lauterpacht, in his first report in 1953 proposed in three of the four alternative versions of draft article 9 on reservations a provision stating that "[t]he text of the reservations received shall be communicated by the depositary authority to all the interested States".[513] But he did not comment on this phrase,[514] which is reproduced in the

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[509] See also article 2, paragraph 1 (f), of the 1969 Convention and article 2, paragraph 1 (k), of the 1978 Vienna Convention on Succession of States in Respect of Treaties, which define the term "contracting State" in the same way.

[510] Sir R. Jennings and Sir A. Watts, *Oppenheim's International Law*, footnote 210 above, p. 1248, note 4.

[511] *Yearbook ... 1951*, vol. II, p. 16.

[512] Report of the International Law Commission on the work of its third session 16 May–27 July 1951, A/1858, p. 8, para. 34 (see *Yearbook ... 1951*, vol. II, p. 130). This point was not extensively discussed; see, however, the statements by Hudson and Spiropoulos, the latter of whom considered that communication to States not parties to the Treaty was not an obligation under positive law (105th meeting, 18 June 1951, *Yearbook ... 1951*, vol. I, p. 198).

[513] *Yearbook ... 1953*, vol. II, p. 92, alternatives B, C and D; oddly enough, this requirement does not appear in alternative A (acceptance of reservations by a two thirds majority, *ibid.*, p. 91).

[514] *Ibid.*, p. 136.

first report by G.G. Fitzmaurice in 1956,[515] who clarified it as follows in draft article 39: these are "all the States which have taken part in the negotiation and drawing up of the treaty or which, by giving their signature, ratification, accession or acceptance, have manifested their interest in it".[516]

(8) Conversely, in 1962, Sir Humphrey Waldock reverted to the 1951 formulation[517] and proposed that any reservation formulated "by a State signing, ratifying, acceding to, or accepting a treaty subsequently to the meeting or conference at which it was adopted shall be communicated to all other States which are, or are entitled to become, parties ...".[518] This was also the formula adopted by the Commission after the Drafting Committee had considered it and made minor drafting changes.[519] While States had not expressed any objections in this regard in their comments on the draft articles adopted on first reading, Sir Humphrey Waldock, without explanation, proposed in 1965 to revert to the phrase "other States concerned",[520] which the Commission replaced by "contracting States"[521] on the ground that the notion of "States concerned"[522] was "very vague", finally adopting, in 1966, the requirement of communication "to the other States entitled to become parties to the treaty",[523] a phrase which was "regarded as more appropriate to describe the recipients of the type of communications in question".[524]

(9) At the Vienna Conference, the delegation of Austria pointed out that that wording "might create difficulties for a depositary, as there was no criterion for deciding which were those States. It would therefore be preferable to substitute the phrase 'negotiating States and contracting States' as proposed in his delegation's amendment (A/CONF.39/C.1/L.158)".[525] Although this common-sense proposal was submitted to the Drafting Committee,[526] the latter preferred an amendment submitted by Spain,[527] which appears in the final text of article 23,

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[515] Draft article 37, *Yearbook ... 1956*, vol. II, p. 115: they "must be brought to the knowledge of the other interested States ...".

[516] *Ibid.*

[517] See paragraphs (5) and (6) above.

[518] First report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 60. Not without reason, Waldock believed that it was unnecessary to notify the other States which took part in the negotiations of a reservation formulated "when signing a treaty at a meeting or conference of the negotiating States" if it appeared at the end of the treaty itself or in the final act of the conference (*ibid.*).

[519] Draft article 18, para. 3; see *ibid.*, p. 176. In its commentary, the Commission considered that this phrase was equivalent to "other interested States" (*ibid.*, p. 180).

[520] Fourth report, *Yearbook ... 1965*, vol. II, p. 56.

[521] *Ibid.*, p. 162.

[522] Explanation given by Sir Humphrey Waldock at the 813th meeting, 29 June 1965, *Yearbook ... 1965*, vol. I, p. 267.

[523] Draft article 18, para. 1 (*Yearbook ... 1966*, vol. II, p. 208).

[524] Explanation given by Briggs, Chairman of the Drafting Committee, *Yearbook ... 1966*, vol. I, p. 293.

[525] *First Session, Summary records*, footnote 35 above, p. 124. Jochen A. Frowein points out that the United States of America had expressed the same concern in 1966 in the General Assembly's discussion of the International Law Commission's draft articles relating to depositaries (A/6309/Rev.1, p. 176) ("Some considerations regarding the function of the depositary – comments on art. 72, para. 1 (d), of the ILC's draft articles on the law of treaties", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1967, p. 533); see also Shabtai Rosenne, "More on the Depositary of International Treaties", *American Journal of International Law*, 1970, pp. 847–848.

[526] See *Documents of the Conference* (A/CONF.39/11/Add.2), footnote 54 above, report of the Committee of the Whole, p. 139, para. 194.

[527] *Ibid.*, document A/CONF.39/C.1/L.149, para. 192 (i); for the text adopted, see *ibid.*, para. 196.

paragraph 1, of the 1969 Convention and which was reproduced in the 1986 text unchanged except for the addition of international organizations.[528]

(10) Not only is the phrase adopted obscure, but the *travaux préparatoires* for the 1969 Convention do little to clarify it. The same is true of paragraphs 1 (b) and 1 (e) of article 77, which, while not referring expressly to reservations, provide that the depositary is responsible for transmitting "to the parties and to the States entitled to become parties to the treaty" copies of the texts of the treaty and informing them of "notifications and communications relating to the treaty";[529] however, the *travaux préparatoires* for these provisions shed no light on this phrase,[530] to which the Commission did not turn its attention.

(11) This was not the case during the preparation of the 1986 Convention. Whereas the Special Rapporteur on the law of treaties between States and international organizations or between two or more international organizations had, in his fourth and fifth reports,[531] merely adapted without comment the text of article 23, paragraph 1, of the 1969 Convention, several members of the Commission expressed particular concern during the discussion of the draft in 1977 regarding the problems posed by the determination of "international organizations entitled to become parties to the treaty".[532] However, following a contentious debate, it was decided merely to transpose the 1969 wording.[533]

(12) It is certainly regrettable that the limitations proposed by Canada in 1968 and by Ushakov in 1977 regarding the recipients of communications relating to reservations were not adopted (in the second case, probably out of a debatable concern not to deviate from the 1969 wording or draw any distinction between the rights of States and those of international organizations); such limitations would have obviated practical difficulties for depositaries without significantly calling into question the "useful" publicity of reservations among truly interested States and international organizations.[534]

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[528] See paragraph (2) above.

[529] Under article 77, paragraph 1 (f), the depositary is also responsible for "informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited".

[530] On the origin of these provisions, see, in particular, the 1951 report by J.L. Brierly, *Yearbook ... 1951*, vol. II, p. 27, and the conclusions of the Commission, *ibid.*, p. 130, para. 34 (l); article 17, para. 4 (c), and article 27, para. 6 (c), of the draft proposed by Waldock in 1962, *Yearbook ... 1962*, vol. II, pp. 66 and 82–83, and article 29, para. 5, of the draft adopted by the Commission on first reading, *ibid.*, p. 185; and draft article 72 adopted definitively by the Commission in 1966, *Yearbook ... 1966*, vol. II, p. 269.

[531] *Yearbook ... 1975*, vol. II, p. 38, and *Yearbook ... 1976*, vol. II (Part One), p. 146.

[532] For example, Ushakov observed that: "In the case of treaties of a universal character concluded between States and international organizations, such communications would thus have to be made to all existing States. For the same category of treaties and also treaties concluded between international organizations only, it would, however, be more difficult to determine what international organizations were 'entitled to become parties'. If 10 international organizations were parties to a treaty, to what other international organizations would the communications have to be sent?" (*Yearbook ... 1977*, vol. I, 1434th meeting, 6 June 1977, p. 101, para. 42).

[533] See in particular the statements by S. Verosta, J.J. Calle y Calle, S. Schwebel and P. Reuter, *ibid.*, p. 102, paras. 45, 46, 48 and 51, and the conclusion of the debates, *ibid.*, 1451st meeting, 1 July 1977, p. 196 and *Yearbook ... 1977*, vol. II, p. 116.

[534] It is interesting to note that, while the specialized agencies of the United Nations are not, nor are they entitled to become, "parties" to the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, they do receive communications relating to the reservations formulated by some States with regard to its provisions. See, in particular, *Summary of Practice ...*, footnote 75 above, pp. 60–61, paras. 199–203.

(13) There is obviously no problem when the treaty itself determines clearly which States or international organizations are entitled to become parties, at least in the case of "closed" treaties; treaties concluded under the auspices of a regional international organization, such as the Council of Europe,[535] OAS[536] or OAU,[537] often fall into this category. Things are much more complicated when it comes to treaties that do not indicate clearly which States are entitled to become parties to them or "open" treaties containing the words "any State",[538] or when it is established that participants in the negotiations were agreed that later accessions would be possible.[539] This is obviously very much the case when depositary functions are assumed by a State that not only has no diplomatic relations with certain other States[540] but also does not recognize as States certain entities that proclaim themselves to be States.

(14) The *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* devotes an entire chapter to describing the difficulties encountered by the Secretary-General in determining the "States and international organizations which may become parties",[541] difficulties which legal theorists have extensively underscored.[542] However, the States that replied on this point to the Commission's questionnaire on reservations to treaties do not mention any particular difficulties in this area, although this can probably be explained by the fact that the problem is not specific to reservations and more generally concerns depositary functions. This is also why the Commission saw no merit in proposing the adoption of one or more guidelines on this point.

(15) By contrast, it is certainly necessary to reproduce in the Guide to Practice the rule set forth in article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions (taking the latter in its broadest formulation), no matter how problematic and arguable the provision may be.

(16) The Commission also wished to specify that, just as reservations must be formulated and confirmed in writing,[543] so too must they be communicated in writing to the other States or international organizations concerned, this being the only means of enabling the recipients to react to them in full knowledge of the facts. This latter requirement is only implicit in the Vienna Convention, but it is clear from the context, since article 23, paragraph 1, is the provision which requires that reservations be formulated in writing and which uses very concise wording to link that condition to the requirement that reservations be communicated.

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[535] See, for instance, article K, paragraph 1, of the 3 May 1996 version of the European Social Charter: "This Charter shall be open for signature by the members of the Council of Europe"; or article 32, paragraph 1, of the Council of Europe Criminal Law Convention on Corruption of 27 January 1999.

[536] See, for example, article XXI of the Inter-American Convention against Corruption of 29 March 1996.

[537] See also, for example, article 12, paragraph 1, of the Lusaka Agreement of 8 September 1994 on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora.

[538] See, for example, article XIII of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid: "The present Convention is open for signature by all States ..."; or article 84, para. 1, of the 1986 Vienna Convention: "The present Convention shall remain open for accession by any State, by Namibia (...) and by any international organization which has the capacity to conclude treaties." See also article 305 of the 1982 United Nations Convention on the Law of the Sea, which opens the Convention for signature by not only "all States", but also Namibia (before its independence) and self-governing States and territories.

[539] Cf. article 15 of the 1969 and 1986 Vienna Conventions.

[540] Cf. article 74 of the Vienna Conventions.

[541] Footnote 75 above, chap. V, pp. 21–30, paras. 73–100.

[542] See, *inter alia*, J.A. Frowein, footnote 525 above, pp. 533–539, and S. Rosenne, footnote 525 above, pp. 847–848.

[543] Cf. guidelines 2.1.1. and 2.2.1.

Besides, when there is no depositary, the formulation and communication of reservations necessarily go hand in hand.[544] Moreover, practice confines itself to communications in written form.[545]

(17) The second paragraph of guideline 2.1.5 concerns the particular case of reservations to constituent instruments of international organizations.

(18) Article 23 of the 1969 and 1986 Vienna Conventions concerning the "procedure regarding reservations" does not deal with this particular case. The general rule set forth in paragraph 1 of that article must, however, be clarified and expanded in this respect.

(19) According to article 20, paragraph 3, of the Vienna Conventions:

> "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization."

Yet that organ can take a decision only if the organization is aware of the reservation, which must therefore be communicated to it.

(20) This problem was overlooked by the first three Special Rapporteurs on the law of treaties and taken up only by Sir Humphrey Waldock in his first report in 1962. He proposed a long draft article 17 on the "Power to formulate and withdraw reservations", paragraph 5 of which provided that:

> "However, in any case where a reservation is formulated to an instrument which is the constituent instrument of an international organization and the reservation is not one specifically authorized by such instrument, it shall be communicated to the Head of the secretariat of the organization concerned in order that the question of its admissibility may be brought before the competent organ of such organization."[546]

(21) Waldock indicated that this clarification was motivated by "a point to which attention is drawn in paragraph 81 of the *Summary of the Practice of the Secretary-General* (ST/LEG/7), where it is stated:

> 'If the agreement should be a constitution establishing an international organization, the practice followed by the Secretary-General and the discussions in the Sixth Committee show that the reservation would be submitted to the competent organ of the organization before the State concerned was counted among the parties. The organization alone would be competent to interpret its constitution and to determine the compatibility of any reservation with its provisions.'"[547]

(22) This provision disappeared from the draft after its consideration by the Drafting Committee,[548] probably because the latter's members felt that the adoption of an express stipulation that the decision on the effect of a reservation to a constituent instrument must be taken by "the competent organ of the organization in question"[549] made that clarification superfluous. The question does not appear to have been raised again subsequently.

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[544] See guideline 2.1.6 (i).

[545] Cf. the "depositary notifications" of the Secretary-General of the United Nations.

[546] *Yearbook ... 1962*, vol. II, p. 61.

[547] *Ibid.*, p. 66, para. (12).

[548] See draft article 18, *ibid.*, pp. 175–176.

[549] Draft article 20, para. 4, *ibid.*

(23) It is not surprising that Sir Humphrey Waldock should have asked the question in 1962: three years earlier, the problem had arisen critically in connection with a reservation by India to the Convention on the Intergovernmental Maritime Consultative Organization (IMCO). The Secretary-General of the United Nations, as depositary of the Convention, transmitted to IMCO the text of the Indian reservation, which had been formulated that very day on the opening of the first session of the IMCO Assembly. He suggested that the IMCO secretariat should refer the question to the IMCO Assembly for a decision. When that referral was contested, the Secretary-General, in a well-argued report, maintained that "this procedure conformed (1) to the terms of the IMCO Convention; (2) to the precedents in depositary practice where an organ or body was in a position to pass upon a reservation; and (3) to the views on this specific situation expressed by the General Assembly during its previous debates on reservations to multilateral conventions".[550]

(24) The Secretary-General stated, *inter alia*, that, "in previous cases where reservations had been made to multilateral conventions which were in force and which either were constitutions of organizations or which otherwise created deliberative organs, the Secretary-General has invariably treated the matter as one for reference to the body having the authority to interpret the convention in question".[551] He cited as examples the communication to the World Health Assembly of the reservation formulated in 1948 by the United States of America to the Constitution of the World Health Organization[552] and the communication the following year of reservations made by the Union of South Africa and by Southern Rhodesia to the General Agreement on Tariffs and Trade (GATT) to the GATT Contracting Parties.[553] In the *Summary of Practice*, the Secretary-General gives another example of his consistent practice in this regard: "when Germany and the United Kingdom accepted the Agreement establishing the African Development Bank of 17 May 1979, as amended, they made reservations which had not been contemplated in the Agreement. The Secretary-General, as depositary, duly communicated the reservations to the Bank and accepted the deposit of the instruments only after the Bank had informed him that it had accepted the reservations".[554]

(25) In view of the principle set forth in article 20, paragraph 3, of the Vienna Conventions and of the practice normally followed by the Secretary-General of the United Nations, the Commission considered it useful to set forth in a guideline the obligation to communicate reservations to the constituent instrument of an international organization to the organization in question.

(26) It nevertheless asked three questions in relation to the precise scope of this rule, the principle of which does not appear to be in doubt:

> (1) Should the guideline include the clarification (which was included in the 1962 Waldock draft[555]) that the reservation must be communicated to the head of the secretariat of the organization concerned?

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[550] *Reservations to multilateral conventions: the Convention on the Intergovernmental Maritime Consultative Organization*, document A/4235, para. 18. See also on this incident Oscar Schachter, "The question of treaty reservations at the 1959 General Assembly", *American Journal of International Law*, 1960, pp. 372–379.

[551] *Ibid.*, para. 21.

[552] See also Oscar Schachter, "Development of International Law through the Legal Opinions of the United Nations Secretariat", *British Year Book of International Law*, vol. 25, 1948, pp. 124–126.

[553] A/4235, para. 22.

[554] ST/LEG/8, New York, footnote 75 above, 1997, p. 59, para. 198 – footnotes omitted. See also F. Horn, footnote 25 above, pp. 346–347.

[555] See paragraph (20) above.

(2) Should it state that the same rule applies when the treaty is not, strictly speaking, the constituent instrument of an international organization, but creates a "deliberative organ" that may take a position on whether or not the reservation is valid, as the Secretary-General had done in his 1959 *Summary of Practice*?[556] and

(3) Does the communication of a reservation to the constituent instrument of an international organization to the latter organization remove the obligation also to communicate the text of the reservation to interested States and international organizations?

(27) On the first question, the Commission considered that such a clarification is not necessary: even if, generally speaking, the communication will be addressed to the head of the secretariat, this may not always be the case because of the particular structure of a given organization. In the case of the European Union, for example, the collegial nature of the Commission might raise some problems. Moreover, such a clarification is of little real value: what matters is that the organization in question should be duly alerted to the problem.

(28) As to whether the same rule should apply to "deliberative organs" created by a treaty which nonetheless are not international organizations in the strict sense of the term, it is very likely that in 1959 the drafters of the report of the Secretary-General of the United Nations had GATT in mind – especially since one of the examples cited related to that organization.[557] The problem no longer arises in that connection, since GATT has been replaced by the World Trade Organization (WTO). The fact remains, however, that certain treaties, especially in the field of disarmament or environmental protection, create deliberative bodies having a secretariat which have sometimes been denied the status of an international organization.[558] The Commission decided not to devote a specific guideline to it. However, it felt that this same rule applies to reservations to constituent instruments *stricto sensu* and to reservations to treaties creating oversight bodies that assist in the application of the treaty whose status as international organizations might be subject to challenge.

(29) The reply to the last question mentioned above[559] is the trickiest. It is also the one that has the greatest practical significance, for a reply in the affirmative would impose a heavier burden on the depositary than a negative one. Moreover, the practice of the Secretary-General — which does not appear to be wholly consistent[560] — seems to tend rather in the opposite direction.[561] The Commission nevertheless believes that a reservation to a constituent

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[556] See paragraph (24) above.

[557] See *ibid.*

[558] See, for example, Robin R. Churchill and Geir Ulfstein, "Autonomous Institutional Arrangements in Multilateral Agreements: A Little-Noticed Phenomenon in International Law", *American Journal of International Law*, 2000, No. 4, pp. 623–659; some authors also argue that the International Criminal Court is not, strictly speaking, an international organization.

[559] Para. (26).

[560] For an earlier example in which it appears that the Secretary-General communicated the reservation of the United States of America to the Constitution of the World Health Organization both to interested States and to the organization concerned, see Oscar Schachter, footnote 552 above, p. 125. See also the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, footnote 75 above, p. 51, para. 170.

[561] In at least one case, however, the State author of a unilateral declaration (which was tantamount to a reservation) — in this case, the United Kingdom — directly consulted the signatories to an agreement establishing an international organization, the Kingston Agreement of 18 October 1969 establishing the Caribbean Development Bank, about the declaration (cf. *Multilateral Treaties ...*, chap. X.6). The author of the reservation may also take the initiative to consult the international organization concerned (cf. the French reservation to the Agreement establishing the Asia-Pacific Institute for Broadcast Development, Kuala Lumpur, 12 August 1977 – *ibid.*, chap. XXV.3).

instrument should be communicated not only to the organization concerned, but also to all other contracting States and organizations and to those entitled to become members thereof.

(30) Two arguments are advanced in support of this position. The first is that it is by no means evident that an organization's acceptance of the reservation precludes member States (or international organizations) from objecting to it.[562] Secondly, there is a good practical argument to support this affirmative reply: even if the reservation is communicated to the organization itself, it is in fact its own member States (or international organizations) that will decide. It is therefore important for them to be aware of the reservation. A two-step procedure is a waste of time.

(31) It goes without saying that the obligation to communicate the text of reservations to a constituent instrument to the international organization concerned arises only if the organization exists, in other words, if the treaty is in force.[563] This would seem to be evident; nevertheless, it appeared that this clarification was necessary, since, without it, it would be difficult to understand the end of the second paragraph of guideline 2.1.5 (it is impossible to communicate a reservation to an international organization or to an organ that does not yet exist).

(32) The question may nevertheless arise as to whether such reservations should not also be communicated before the effective creation of the organization to the "preparatory committees" (or whatever name they may be given) that are often established to prepare for the prompt and effective entry into force of the constituent instrument. Even if in many cases an affirmative reply again appears necessary, it is difficult to generalize, since everything depends on the exact mandate that the conference that adopted the treaty gives to the preparatory committee.

2.1.6 Procedure for communication of reservations

1. Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, the communication of a reservation to a treaty shall be transmitted:

(i) if there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) if there is a depositary, to the latter, which shall notify the States and international organizations for which it is intended as soon as possible.

2. The communication of a reservation shall be considered as having been made with regard to a State or an international organization only upon receipt by that State or organization.

3. The communication of a reservation to a treaty by means other than a diplomatic note or depositary notification, such as electronic mail or facsimile, must be confirmed within an appropriate period of time by such a note or notification. In such case, the reservation is considered as having been formulated at the date of the initial communication.

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[562] See guideline 2.8.12 and commentary thereto.

[563] In practice, when the constituent instrument is not in force, the Secretary-General of the United Nations proceeds as he would in respect of any other treaty.

Commentary

(1) As in the two guidelines that follow, guideline 2.1.6 seeks to clarify aspects of the procedure to be followed in communicating the text of a treaty reservation to the addressees of the communication that are specified in guideline 2.1.5. It covers two different but closely linked aspects:

- The author of the communication; and
- The practical modalities of the communication.

(2) Article 23 of the 1969 and 1986 Vienna Conventions is silent as to the person responsible for such communication. In most cases this will be the depositary, as shown by the provisions of article 79 of the 1986 Convention,[564] which generally apply to all notifications and communications concerning treaties. The provisions of that article also give some information on the modalities for the communication.

(3) On prior occasions when the topic of reservations to treaties was considered, the Commission or its special rapporteurs planned to stipulate expressly that it was the duty of the depositary to communicate the text of formulated reservations to interested States. In 1951, for example, the Commission held that "the depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention".[565] Likewise, in his fourth report in 1965, Sir Humphrey Waldock proposed that a reservation "shall be notified to the depositary or, where there is no depositary, to the other interested States".[566]

(4) In the end, this formula was not adopted by the Commission, which, noting that the drafts previously adopted "contained a number of articles in which reference was made to communications or notifications to be made directly to the States concerned, or if there was a depositary, to the latter", came to the conclusion that "it would allow a considerable simplification to be effected in the texts of the various articles if a general article were to be introduced covering notifications and communications".[567]

(5) That was the object of draft article 73 of 1966, now article 78 of the 1969 Vienna Convention, which was reproduced without change except for the addition of international organizations in article 79 of the 1986 Convention:

> "Notifications and communications
>
> Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State or any international organization under the present Convention shall:
>
> (a) If there is no depositary, be transmitted direct to the States and organizations for which it is intended, or if there is a depositary, to the latter;
>
> (b) Be considered as having been made by the State or organization in question only upon its receipt by the State or organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;

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[564] Art. 78 of the 1969 Convention.

[565] Report of the International Law Commission covering the work of its third session, 16 May–27 July 1951, *Yearbook ... 1951*, vol. II, document A/1858, para. 34, p. 130.

[566] *Yearbook ... 1965*, vol. II, p. 53.

[567] *Yearbook ... 1966*, vol. II, para. (1) of the commentary to draft article 73, p. 270.

> (c) If transmitted to a depositary, be considered as received by the State or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 78, paragraph 1 (e)."

(6) Article 79 is indissociable from this latter provision, under which:

> "1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in particular:
>
> ...
>
> (e) Informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty."

(7) It may be noted in passing that the expression "the parties and the States and international organizations entitled to become parties to the treaty", which is used in this paragraph, is not the exact equivalent of the formula used in article 23, paragraph 1, which refers to "contracting States and contracting organizations". The difference has no practical consequences, since the contracting States and contracting international organizations are quite obviously entitled to become parties to the treaty and indeed do so simply by virtue of the treaty's entry into force, in accordance with the definition of the terms given in article 2, paragraph 1 (f), of the 1986 Vienna Convention; it does pose a problem, however, with regard to the wording of the guideline to be included in the Guide to Practice.

(8) There is no doubt that the provisions of article 78, paragraph 1 (e), and article 79 of the 1986 Vienna Convention should be reproduced in the Guide to Practice and adapted to the special case of reservations; otherwise, the Guide would not fulfil its pragmatic purpose of making available to users a full set of guidelines enabling them to determine what conduct to adopt whenever they are faced with a question relating to reservations. However, the Commission did wonder whether, in preparing this guideline, it should reproduce the wording of these two provisions or that of article 23, paragraph 1. It seemed logical to adopt the terminology used in the latter so as to avoid any ambiguity and conflict — even purely superficial — between the various guidelines of the Guide to Practice.

(9) Moreover, there can be no doubt that communications relating to reservations — especially those concerning the actual text of reservations formulated by a State or an international organization — are communications "relating to the treaty" within the meaning of article 78, paragraph 1 (e), referred to above.[568] Furthermore, in its 1966 draft, the Commission expressly entrusted the depositary with the task of "examining whether a signature, an instrument *or a reservation* is in conformity with the provisions of the treaty and of the present articles".[569] This expression was replaced in Vienna with a broader one — "the signature or any instrument, notification or communication relating to the treaty"[570] — which cannot, however, be construed as excluding reservations from the scope of the provision.

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[568] See paragraph (6) above.

[569] *Yearbook ... 1966*, vol. II, p. 269, draft article 72, para. 1 (d) (emphasis added). On the substance of this provision, see the commentary to guideline 2.1.7 below.

[570] Art. 77, para. 1 (d). The new wording is derived from an amendment proposed by the Byelorussian Soviet Socialist Republic, which was adopted by the Committee of the Whole by 32 votes to 24, with 27 abstentions, (*Documents of the Conference*, footnote 54 above, para. 654 (iv) (4), p. 202, and para. 660 (i), p. 203).

(10) In addition, as indicated in the Commission's commentary to draft article 73 (now article 79 of the 1986 Convention), the rule laid down in subparagraph (a) of this provision "relates essentially to notifications and communications relating to the 'life' of the treaty – acts establishing consent, *reservations*, objections, notices regarding invalidity, termination, etc.".[571]

(11) In essence, there is no doubt that both article 78, paragraph 1 (e), and article 79 (a) reflect current practice.[572] They warrant no special comment, except for the observation that, even in cases where there is a depositary, the State that is the author of the reservation may directly inform the other States or international organizations concerned of the text of the reservation. Thus, the United Kingdom, for example, informed the Secretary-General of the United Nations, as depositary of the Agreement of 18 October 1969 establishing the Caribbean Development Bank, that it had consulted all the signatories to that agreement with regard to an aspect of the declaration (constituting a reservation) which it had attached to its instrument of ratification (and which was subsequently accepted by the Board of Governors of the Bank and then withdrawn by the United Kingdom).[573] Likewise, France submitted to the Board of Governors of the Asia-Pacific Institute for Broadcasting Development a reservation which it had formulated to the agreement establishing that organization, for which the Secretary-General is also depositary.[574]

(12) There seem to be no objections to this practice, provided that the depositary is not thereby released from his own obligations.[575] It is, however, a source of confusion and uncertainty in the sense that the depositary could leave it up to States formulating reservations to perform the function expressly conferred on him by article 78, paragraph 1 (e), and the final phrase of article 79 (a) of the 1986 Vienna Convention.[576] For this reason, the Commission considered that such a practice should not be encouraged and refrained from proposing a guideline enshrining it.

(13) In its 1966 commentary, the Commission dwelt on the importance of the task entrusted to the depositary in draft article 73, paragraph 1 (e) (now article 77, paragraph 1 (e), of the 1969 Vienna Convention),[577] and stressed "the obvious desirability of the prompt performance of this function by a depositary".[578] This is an important issue, which is linked to subparagraphs (b) and (c) of article 78:[579] the reservation produces effects only as from the date on which the communication relating thereto is received by the States and organizations for which it is intended, and not as from the date of its formulation. In truth, it matters little whether the communication is made directly by the author of the reservation; he will have no one but himself to blame if it is transmitted late to its recipients. On the other hand, if there is a depositary, it is essential for the latter to display promptness; otherwise, the depositary could

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[571] *Yearbook ... 1966*, vol. II, p. 270, para. (2) of the commentary (emphasis added).

[572] See *ibid.* with regard to draft article 73 (a) (which became article 78 of the 1969 Convention and article 79 of the 1986 Convention).

[573] See *Multilateral Treaties ...*, chap. X.6.

[574] See *ibid.*, chap. XXV.3.

[575] See guideline 2.1.7 below.

[576] Art. 77, para. 1 (e), and art. 78 (a), respectively, of the 1969 Convention. In the aforesaid case of the French reservation to the Agreement establishing the Asia-Pacific Institute for Broadcasting Development, it seems that the Secretary-General confined himself to taking note of the absence of objections from the organization's Governing Council (see *Multilateral Treaties ...*, chap. XXV.3). The Secretary-General's passivity in this instance is subject to criticism.

[577] Art. 78, para. 1 (e), of the 1986 Convention.

[578] *Yearbook ... 1966*, vol. II, para. (5) of the commentary, p. 270.

[579] Art. 79 (a) and (b) of the 1986 Convention. See the text of these provisions in paragraph (5) above.

stall both the effect of the reservation and the opportunity for the other States and international organizations concerned to react to it.[580]

(14) In practice, at the current stage of modern means of communication, depositaries, at any event in the case of international organizations, perform their tasks with great speed. Whereas in the 1980s the period between the receipt of reservations and the communication thereof could vary from one to two and even three months, it is apparent from the information supplied to the Commission by the Treaty Section of the United Nations Office of Legal Affairs that:

> "1. The time period between receipt of a formality by the Treaty Section and its communication to the parties to a treaty is approximately 24 hours unless a translation is required or a legal issue is involved. If a translation is required, in all cases, it is requested by the Treaty Section on an urgent basis. If the legal issue is complex or involves communications with parties outside the control of the United Nations, then there may be some delay; however, this is highly unusual. It should be noted that, in all but a few cases, formalities are communicated to the relevant parties within 24 hours.
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> 2. Depositary notifications are communicated to permanent missions and relevant organizations by both regular mail and electronic mail, within 24 hours of processing (see LA 41 TR/221). Additionally, effective January 2001, depositary notifications can be viewed on the United Nations Treaty Collection on the Internet at: http://untreaty.un.org (depositary notifications on the Internet are for information purposes only and are not considered to be formal notifications by the depositary). Depositary notifications with bulky attachments, for example those relating to chapter 11 (b) 16,[581] are sent by facsimile."[582]

(15) As of 1 April 2010 the communication procedure followed by the Secretary-General in his capacity as depositary has been simplified:

> "Depositary Notifications (CNs) will be available electronically only and the print versions will be discontinued as of *Thursday, 1 April 2010*.

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[580] See the commentary to draft article 73 in the 1966 report of the Commission, *Yearbook ... 1966*, vol. II, pp. 270–271, paras. (3) to (6) of the commentary; see also T.O. Elias, *The Modern Law of Treaties* (Dobbs Ferry/Leiden: Oceana Publications/Sijthoff, 1974), pp. 216–217.

[581] These are communications relating to the Agreement of 20 March 1958 concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of These Prescriptions (see *Multilateral Treaties* ..., chap. XI-B.16).

[582] The Treaty Section has also advised: "3. Please note that the depositary practice has been changed in cases where the treaty action is a modification to an existing reservation and where a reservation has been formulated by a party subsequent to establishing its consent to be bound. A party to the relevant treaty now has 12 months within which to inform the depositary that it objects to the modification or that it does not wish to consider the reservation made subsequent to ratification, acceptance, approval, etc. The time period for this 12 months is calculated by the depositary on the basis of the date of issue of the depositary notification [see LA 41 TR/221 (23-1)]." See also Palitha T.B. Kohona, "Some Notable Developments in the Practice of the UN Secretary-General as Depository of Multilateral Treaties: Reservations and Declarations", *American Journal of International Law*, vol. 99 (2005), pp. 433–450, and "Reservations: Discussion of Recent Developments in the Practice of the Secretary-General of the United Nations as Depositary of Multilateral Treaties", *Georgia Journal of International and Comparative Law*, vol. 33 (2005), pp. 415–450.

> The CNs will continue to be accessible on the Web site of the United Nations Treaty Collection <http://treaties.un.org>, under "Depositary Notifications (CNs)". In addition, the permanent missions, as well as all other interested individuals, are urged to subscribe to receive depositary notifications electronically by e-mail through the Treaty Section's "Automated CN Subscription Service", which is also available at <http://treaties.un.org>.
>
> This initiative is part of the United Nations effort to reduce paper consumption and to conserve energy and resources."[583]

(16) For its part, the secretariat of the International Maritime Organization (IMO) has informed the Commission that the time period between the communication of a reservation to a treaty for which the organization is depositary and its transmittal to the States concerned is generally from one to two weeks. Communications, which are translated into the three official languages of the organization (English, Spanish and French), are always transmitted by regular mail.

(17) The practice of the Council of Europe has been described to the Commission by the secretariat of the Council as follows:

> "The usual period is two to three weeks (notifications are grouped and sent out approximately every two weeks). In some cases, delays occur owing to voluminous declarations/reservations or appendices (descriptions or extracts of domestic law and practices) that must be checked and translated into the other official language (the Council of Europe requires that all notifications be made in one of the official languages or be at least accompanied by a translation into one of these languages. The translation into the other official language is provided by the Treaty Office). Urgent notifications that have immediate effect (e.g., derogations under article 15 of the European Convention on Human Rights) are carried out within a couple of days.
>
> Unless they prefer notifications to be sent directly to the Ministry of Foreign Affairs (currently 11 out of 43 member States), the original notifications are sent out in writing to the permanent representations in Strasbourg, which in turn forward them to their capitals. Non-member States that have no diplomatic mission (consulate) in Strasbourg are notified via a diplomatic mission in Paris or Brussels or directly. The increase in member States and notifications over the last 10 years has prompted one simplification: since 1999, each notification is no longer signed individually by the Director-General of Legal Affairs (acting for the Secretary-General of the Council of Europe), but notifications are grouped and only each cover letter is signed individually. There have not been any complaints against this procedure.
>
> Since our new web site (http://conventions.coe.int) became operational in January 2000, all information relating to formalities is immediately made available on the web site. The texts of reservations or declarations are put on the web site the day they are officially notified. Publication on the web site is, however, not considered to constitute an official notification."

(18) Lastly, it is apparent from information from the Organization of American States (OAS) that:

> "Member States are notified of any new signatures and ratifications to inter-American treaties through the OAS Newspaper, which circulates every day. In a more

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[583] *Journal of the United Nations*, 25 March 2010, No. 2010/57, p. 17.

> formal way, we notify every three months through a *procès-verbal* sent to the permanent missions to OAS or after meetings where there are a significant number of new signatures and ratifications such as, for example, the General Assembly.
>
> The formal notifications, which also include the bilateral agreements signed between the General Secretariat and other parties, are done in Spanish and English."

(19) It did not seem necessary to the Commission for these very helpful clarifications to be reproduced in full in the Guide to Practice. It nonetheless seemed useful to give in guideline 2.1.6 some information in the form of general recommendations intended both for the depositary (where there is one) and for the authors of reservations (where there is no depositary). This guideline combines the text of article 78, paragraph 1 (e), and article 79 of the 1986 Vienna Convention[584] and adapts it to the special problems posed by the communication of reservations.

(20) The *chapeau* of this guideline reproduces the relevant parts that are common to the *chapeaux* of articles 78 and 79 of the 1969 and 1986 Vienna Conventions, with some simplification: the wording decided upon at Vienna to introduce article 78 ("the contracting States and contracting organizations or, as the case may be, by the contracting organizations ...") appears to be unnecessarily cumbersome and conveys little additional information. Moreover, as noted above,[585] the text of guideline 2.1.6 reproduces, with one small difference, the wording of article 23, paragraph 1, of the 1986 Convention ("to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty"), in preference to that used in article 78, paragraph 1 (e) ("the parties and the States and international organizations entitled to become parties to the treaty"). While the latter formulation is probably more elegant and has the same meaning, it departs from the terminology used in the section of the Vienna Conventions relating to reservations. However, it did not seem useful to burden the text by using the article 23 expression twice in subparagraphs (i) and (ii). Incidentally, this purely drafting improvement involves no change in the Vienna text: the expression "the States and organizations for which it is intended" (ii) refers to the "contracting States and contracting organizations and other States and international organizations entitled to become parties" (i).

(21) As to the time periods for the transmittal of the reservation to the States or international organizations for which it is intended, the Commission did not think it possible to establish a rigid period of time. The expression "as soon as possible" in subparagraph (ii) seems enough to draw the attention of the addressees to the need to proceed rapidly. On the other hand, such an indication is not required in subparagraph (i): it is for the author of the reservation to assume his responsibilities in this regard.[586]

(22) In keeping with guidelines 2.1.1 and 2.2.4, which point out that the formulation and confirmation of reservations must be done in writing, the last paragraph of guideline 2.1.6 specifies that communication to the States and international organizations for which they are intended must take a specific form. While some members of the Commission may have expressed doubts about the need for this stipulation, it seemed useful in view of the frequent practice among depositaries of using modern means of communication. For this reason, a majority of the members of the Commission considered that any communication of a reservation should be confirmed in a diplomatic note (in cases where the author is a State) or

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[584] Art. 77, para. 1 (e), and art. 79 of the 1969 Convention.

[585] Paragraphs (7) and (8).

[586] See paragraph (13) above.

in a "depositary notification" (when it is from an international organization[587]). In this case, the time period begins at the time the electronic mail or facsimile is sent: this has the advantage of preventing any disputes as to the date of receipt of the confirmation and does not give rise to practical problems since, according to the indications given to the Commission, the written confirmation is usually done at the same time or very shortly thereafter, at least by depositary international organizations. These clarifications are given in the third paragraph of guideline 2.1.6.

(23) It seemed neither useful nor possible to be specific about the language or languages in which such communications must be transmitted, since the practices of depositaries vary.[588] Similarly, the Commission took the view that it was wise to follow practice on the question of the organ to which, specifically, the communication should be addressed.[589]

(24) On the other hand, the second paragraph of guideline 2.1.6 reproduces the rule set out in subparagraphs (b) and (c) of article 79 of the 1986 Vienna Convention.[590] It did, however, seem possible to simplify the wording without drawing a distinction between cases in which the reservation is communicated directly by the author and instances in which it is done by the depositary. In both cases, it is the receipt of the communication by the State or international organization for which it is intended that is decisive. It is, for example, from the date of receipt that the period within which an objection may be formulated is counted.[591] It should be noted that the date of effect of the notification may differ from one State or international organization to another, depending on the date of receipt.

(25) These clarifications regarding the procedure relating to the communication of a reservation apply *mutatis mutandis* to other unilateral acts covered by the Guide to Practice, and particularly with regard to the formalities governing and reactions to reservations (withdrawal, acceptance and objection) and interpretative declarations as well as reactions to an interpretative declaration (approval, opposition, recharacterization). The Commission nevertheless did not think it necessary to reproduce the wording of guideline 2.1.6 for each type of act. The corresponding guidelines[592] merely contain cross references to the present guidelines.

2.1.7 Functions of depositaries

1. The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, if need be, bring the matter to the attention of the State or international organization concerned.

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[587] A depositary notification has become the usual means by which depositary international organizations or heads of secretariat make communications relating to treaties. The usual diplomatic notes could nevertheless be used by an international organization in the case of a communication addressed to non-member States of the organization that do not have observer status.

[588] Where the depositary is a State, it generally seems to transmit communications of this type in its official language(s); an international organization may use all its official languages (IMO) or one or two working languages (United Nations).

[589] Ministries of Foreign Affairs, diplomatic missions to the depositary State(s), permanent missions to the depositary organization.

[590] See paragraph (5) above.

[591] Regarding objections, see guideline 2.6.12.

[592] See guidelines 2.4.5, 2.5.6, 2.6.8, 2.8.5 and 2.9.7.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) the signatory States and organizations and the contracting States and contracting organizations; or

(b) where appropriate, the competent organ of the international organization concerned.

Commentary

(1) The section of the Vienna Conventions on the law of treaties devoted to reservations makes no mention of the role of the depositary. This silence is explained by the decision, adopted belatedly during the elaboration of the 1969 Convention, to subsume the provisions relating to the communication of reservations within the general provisions applicable to depositaries.[593] Consequently, it is thus self-evident, however, that the provisions of articles 77 and 78 of the 1986 Convention[594] are fully applicable to reservations insofar as they are relevant to them. Guideline 2.1.7 makes this clear.

(2) Under article 78, paragraph 1 (e), of the 1986 Convention, the depositary is responsible for "informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty". This rule, combined with the one in article 79 (a), is reproduced in guideline 2.1.6. This guideline also implies that the depositary receives and keeps custody of reservations;[595] it therefore seems unnecessary to mention this expressly.

(3) It goes without saying that the general provisions of article 77, paragraph 2, relating to the international character of the functions of depositaries and their obligation to act impartially apply to reservations as to any other field.[596] In this general form, these principles do not specifically concern the functions of depositaries in relation to reservations, and thus there does not seem to be any need to reproduce them as such in the Guide to Practice. These provisions must, however, be placed in the context of those in article 78, paragraph 2:

> "In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:
>
> (a) the signatory States and organizations and the contracting States and contracting organizations; or
>
> (b) where appropriate, the competent organ of the international organization concerned."

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[593] See paragraph (1) of the commentary to draft article 73 adopted by the Commission on second reading in 1966, *Yearbook ... 1966*, vol. II, p. 270.

[594] Articles 76 and 77 of the 1969 Vienna Convention.

[595] See article 78, paragraph 1 (c): "... the functions of a depositary (...) comprise (...):
(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it".

[596] "The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation."

(4) These substantial limitations on the functions of depositaries were established as a result of problems that arose with regard to certain reservations; hence it appears all the more essential to recall these provisions in the Guide to Practice, adapting them to the special case of reservations.

(5) The problem is posed in different terms when the depositary is a State that is itself a party to the treaty or when it is "an international organization or the chief administrative officer of the organization".[597] In the first case, "if the other parties found themselves in disagreement with the depositary on this question — a situation which, to our knowledge, has never materialized — they would not be in a position to insist that he follow a course of conduct different from the one he believed that he should adopt".[598] In the second case, on the other hand, the political organs of the organization (composed of States that are not necessarily parties to the treaty) can give instructions to the depositary. It is in this context that problems have arisen, and their solution has consistently tended towards a strict limiting of the depositary's power of judgement, ultimately culminating in the rules laid down in the 1969 Vienna Convention and reproduced in the 1986 Convention.

(6) As early as 1927, in the wake of the difficulties created by the reservations to which Austria intended to subject its deferred signature of the International Opium Convention of 19 February 1925, the Council of the League of Nations adopted a resolution endorsing the conclusions of a Committee of Experts[599] and giving instructions to the Secretary-General of the League as to the conduct to be adopted.[600]

(7) But it is in the context of the United Nations that the most serious problems have arisen, as can be seen from the main stages in the evolution of the role of the Secretary-General as depositary in respect of reservations:[601]

- Initially, the Secretary-General "seemed to determine alone ... his own rules of conduct in the matter"[602] and subjected the admissibility of reservations to the unanimous acceptance of the contracting parties or the international organization whose constituent instrument was involved;[603]
- Following the advisory opinion of the International Court of Justice of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,[604] the General Assembly adopted a first resolution in which it requested the Secretary-General "in respect of future conventions …:

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[597] Art. 77, para. 1, of the 1986 Vienna Convention.

[598] Jacques Dehaussy, "Le dépositaire de traités", *R.G.D.I.P.*, 1952, p. 515.

[599] See the report of the Committee, composed of Mr. Fromageot, Mr. MacNair and Mr. Diéna, in *JOSdN* 1927, p. 881.

[600] Resolution of 17 June 1927. See also resolution XXIX of the Eighth Conference of American States (Lima, 1938), which established the rules to be followed by the Pan American Union with regard to reservations.

[601] See also, for example, Pierre-Henri Imbert, "A l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités – Réflexions sur la pratique suivie par le Secrétaire général des Nations Unies dans l'exercice de ses fonctions de dépositaire", *A.F.D.I.*, 1980, pp. 528–529, or Shabtai Rosenne, *Developments in the Law of Treaties 1945–1986*, Cambridge University Press, 1987, pp. 429–434.

[602] J. Dehaussy, footnote 598 above, p. 514.

[603] See the *Summary of Practice of the Secretary-General …*, footnote 75 above, pp. 50–51, paras. 168–171.

[604] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951, p. 15.

(i) To continue to act as depositary in connection with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and

(ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications";[605]

- These guidelines were extended to all treaties for which the Secretary-General assumes depositary functions under resolution 1452 B (XIV) of 7 December 1959, adopted as a result of the problems related to the reservations formulated by India to the constituent instrument of the Intergovernmental Maritime Consultative Organization (IMCO).[606]

(8) This is the practice followed since then by the Secretary-General of the United Nations and, apparently, by all international organizations (or the heads of the secretariats of international organizations) with regard to reservations where the treaty in question does not contain a reservations clause.[607] And it was this practice that the International Law Commission drew on in formulating the rules to be applied by the depositary in this area.

(9) It should also be noted that, once again, the formulation adopted tended towards an ever greater limitation of the depositary's powers:

- In the draft adopted on first reading in 1962, paragraph 5 of draft article 29 on "the functions of a depositary" provided that:

  "On a reservation having been formulated, the depositary shall have the duty:

  (a) To examine whether the formulation of the reservation is in conformity with the provisions of the treaty and of the present articles relating to the formulation of reservations, and, if need be, to communicate on the point with the State which formulated the reservations;

  (b) To communicate the text of any reservation and any notifications of its acceptance or objection to the interested States as prescribed in articles 18 and 19";[608]

- The draft adopted on second reading in 1966 further provided that the functions of the depositary comprised:

  "Examining whether a signature, an instrument or a reservation is in conformity with the provisions of the treaty and of the present articles and, if need be, bringing the matter to the attention of the State in question";[609]

The commentary on this provision dwelt, however, on the strict limits on the depositary's examining power:

> "Paragraph 1 (d) recognizes that a depositary has a certain duty to examine whether signatures, instruments and reservations are in conformity with any applicable provisions of the treaty or of the present articles, and if necessary to bring the matter to the attention of the State in question. That is, however, the limit of the depositary's duty in this connexion. It is no part of the functions to adjudicate on the validity of an

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[605] Resolution 598 (VI) of 12 January 1952, para. 3 (b).

[606] See paragraphs (23) and (24) of the commentary to guideline 2.1.5.

[607] See *Summary of Practice of the Secretary-General* ..., footnote 75 above, pp. 60–61, paras. 177–188.

[608] *Yearbook ... 1962*, vol. II, p. 185.

[609] Draft art. 72, para. 1 (d), *Yearbook ... 1966*, vol. II, p. 269.

instrument or reservation. If an instrument or reservation appears to be irregular, the proper course of a depositary is to draw the attention of the reserving State to the matter and, if the latter does not concur with the depositary, to communicate the reservation to the other interested States and bring the question of the apparent irregularity to their attention ...".[610]

- During the Vienna Conference, an amendment proposed by the Byelorussian Soviet Socialist Republic[611] further attenuated the provision in question: even if the disappearance of any express reference to reservations certainly does not prevent the rule laid down in article 77,[612] paragraph 1 (d), from applying to these instruments, the fact remains that the depositary's power is limited henceforth to examining the *form* of reservations, his function being that of:

  "Examining whether the signature or any instrument, notification or communication relating to the treaty is *in due and proper form* and, if need be, bringing the matter to the attention of the States in question."[613]

(10) In this way, the principle of the depositary as "letter box" was established. As Elias has written: "It is essential to emphasize that it is no part of the depositary's function to assume the role of interpreter or judge in any dispute regarding the nature or character of a party's reservation *vis-à-vis* the other parties to a treaty, or to pronounce a treaty as having come into force when that is challenged by one or more of the parties to the treaty in question."[614]

(11) Opinions are divided as to the advantages or disadvantages of this diminution of the depositary's competencies with regard to reservations. Of course, as the International Court of Justice emphasized in its 1951 opinion, "the task of the [depositary] would be simplified and would be confined to receiving reservations and objections and notifying them".[615] "The effect of this, it is suggested, is to transfer the undoubted subjectivities of the United Nations system from the shoulders of the depositary to those of the individual States concerned, in their quality of parties to that treaty, and in that quality alone. This may be regarded as a positive innovation, or perhaps clarification of the modern law of treaties, especially of reservations to multilateral treaties, and is likely to reduce or at least limit the 'dispute' element of unacceptable reservations."[616]

(12) Conversely, we may also see in the practice followed by the Secretary-General of the United Nations and embodied, indeed "solidified", in the 1969 Vienna Convention, "an unnecessarily complex system"[617] insofar as the depositary is no longer able to impose the

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[610] *Ibid.*, pp. 269–270, para. (4) of the commentary.

[611] See footnote 54 above, *Documents of the Conference*, A/CONF.39/11/Add.2, para. 657 (iv) (4), p. 202, and para. 660 (i), p. 203.

[612] Article 78 in the 1986 Convention.

[613] The 1986 text (emphasis added).

[614] T.O. Elias, footnote 580 above, p. 213.

[615] *I.C.J. Reports 1951*, footnote 604 above, p. 27; and it may be considered that: "It is that passage which has established the theoretical basis for the subsequent actions by the General Assembly and the International Law Commission. For it is in that sentence that the essentially administrative features of the function [of the depositary] are emphasized and any possible political (and that means decisive) role is depressed to the greatest extent" (Shabtai Rosenne, "The Depositary of International Treaties", *American Journal of International Law*, 1967 p. 931).

[616] S. Rosenne, footnote 601 above, pp. 435–436.

[617] P.-H. Imbert, footnote 601 above, p. 534; the author applies the term only to the practice of the Secretary-General and seems to consider that the Vienna Convention simplifies the context of the problem.

least amount of coherence and unity in the interpretation and implementation of reservations.[618]

(13) The fact remains that distrust of the depositary, as reflected in the provisions analysed above of the relevant articles of the Vienna Conventions, is too deeply entrenched, both in minds and in practice, for there to be any consideration of revising the rules adopted in 1969 and perpetuated in 1986. For this very reason the Commission decided not to include in the Guide an element of progressive development that would have, for example, allowed depositaries to draw the attention of a reservation's author to the fact that they considered the reservation to be manifestly impermissible. In the light of the criticism that this elicited, the Commission chose not to retain in the final version of the Guide to Practice the draft guideline on this subject that it had originally considered.[619] In the Commission's view, there is little choice but to reproduce verbatim in the Guide to Practice the relevant provisions of article 78, paragraphs 1 (d) and 2, of the 1986 Vienna Convention, combining them in a single guideline and applying them only to the functions of depositaries with regard to reservations.

(14) The first paragraph of the guideline is based on the text of the first part of article 78, paragraph 1 (d), with express and exclusive reference to the approach that the depositary is to take to reservations. The second paragraph reproduces the text of paragraph 2 of the same article while limiting the situation in question to that sole function (and not to the functions of the depositary in general, as article 78 does).

2.2 Confirmation of reservations

2.2.1 Formal confirmation of reservations formulated when signing a treaty

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been formulated on the date of its confirmation.

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[618] The depositary can, however, play a not insignificant role in the "reservations dialogue" in reconciling opposing points of view, where appropriate. See also Henry Han, "The UN Secretary-General's Treaty Depositary Function: Legal Implications", *British Year Book of International Law*, 1988, pp. 570–571; the author here dwells on the importance of the role that the depositary can play, but the article pre-dates the Vienna Conference.

[619] Draft guideline 2.1.8 (Procedure in case of manifestly impermissible reservations) read as follows:

> "Where, in the opinion of the depositary, a reservation is manifestly impermissible, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes the grounds for the impermissibility of the reservation.
>
> If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation." (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 359–361.

Commentary

(1) Guideline 2.2.1 reproduces the exact wording of the text of article 23, paragraph 2, of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. As the Commission indicated in the commentary to guideline 1.1, it is consistent with the aim of the Guide to Practice to bring together in a single document all of the recommended rules and practices in respect of reservations.

(2) The text of article 23, paragraph 2, of the 1986 Convention is identical to the corresponding provision of the 1969 Convention, except that it refers to the procedure to be followed when an international organization is a party to a treaty. Because it is more complete, the 1986 wording was preferred to the 1969 wording.

(3) This provision originated in the proposal made by Sir Humphrey Waldock in his first report on the law of treaties for the inclusion of a provision (draft article 17, paragraph 3 (b)) based on the principle that "the reservation will be presumed to have lapsed unless some indication is given in the instrument of ratification that it is maintained".[620] The Special Rapporteur did not conceal that "[c] clearly, different opinions may be held as to what exactly is the existing rule on the point, if indeed any rule exists at all[621] and mentioned, in particular, article 14 (d)[622] of the Harvard draft, which posited the contrary assumption.[623]

(4) The principle of the obligation to confirm a reservation formulated when signing was stated in article 18, paragraph 2, of the Commission's draft articles on the law of treaties, which were adopted without much discussion in 1962[624] and which related generally to reservations formulated before the adoption of the text.

(5) The 1962 commentary gives a concise explanation of the *raison d'être* of the rule adopted by the Commission:

> "A statement of reservation is sometimes made during the negotiation and duly recorded in the *procès-verbaux*. Such embryo reservations have sometimes been relied upon afterwards as amounting to formal reservations. It seems essential, however, that the State concerned should formally reiterate the statement in some manner in order that its intention actually to formulate a reservation should be clear."[625]

(6) On second reading, the wording of the draft provisions on the procedure in respect of reservations was considerably simplified at the urging of some Governments, which considered that many of them "would fit better into a code of recommended practices".[626] The new provision, which was adopted on the basis of the proposals by the Special Rapporteur, Sir Humphrey Waldock,[627] differs from the current text of article 23, paragraph 2, only by the inclusion of a reference to reservations formulated "on the occasion of the

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[620] *Yearbook ... 1962*, vol. II, p. 66.

[621] *Ibid.*

[622] Waldock was citing article 15 (d) by mistake.

[623] "If a State has made a reservation when signing a treaty, its later ratification will give effect to the reservation in the relations of that State with other States which have become or may become parties to the treaty"; the Harvard draft is reproduced in *Yearbook ... 1950*, vol. II, pp. 243–244.

[624] See the summary records of the 651st to 656th meetings (25 May–4 June 1962), *Yearbook ... 1962*, vol. I, pp. 139–179.

[625] *Yearbook ... 1962*, vol. II, p. 180.

[626] Comments by Sweden, *ibid.*, vol. II, p. 47.

[627] *Ibid.*, pp. 53–54.

adoption of the text",[628] which was deleted at the Vienna Conference under circumstances that have been described as "mysterious".[629] The commentary to this provision reproduces the 1962 text[630] almost verbatim and adds:

> "Paragraph 2 concerns reservations made at a later stage [after negotiation]: on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval. Here again the Commission considered it essential that, when definitely committing itself to be bound, the State should leave no doubt as to its final standpoint in regard to the reservation. The paragraph accordingly requires the State formally to confirm the reservation if it desires to maintain it. At the same time, it provides that in these cases the reservation shall be considered as having been made on the date of its confirmation, a point which is of importance for the operation of paragraph 5 of article 17 [20 in the text of the Convention]."[631]

(7) The rule in article 23, paragraph 2, of the 1969 Convention was reproduced in the 1986 Convention with only the drafting changes made necessary by the inclusion of international organizations[632] and the introduction of the concept of "formal confirmation" (with the risks of confusion which this implies between that concept and the concept of the formal confirmation of the reservation in article 23).[633] The 1986 Vienna Conference adopted the Commission's text[634] without any amendment of the French text.[635]

(8) While there can be hardly any doubt that, at the time of its adoption, article 23, paragraph 2, of the 1969 Convention related more to progressive development than to codification in the strict sense,[636] it may be considered that the obligation formally to confirm reservations formulated when treaties in solemn form are signed has become part of positive law. Crystallized by the 1969 Convention and confirmed in 1986, the rule is followed in practice (although not systematically)[637] and seems to satisfy an *opinio necessitatis juris*, which allows a customary value to be assigned to it.[638]

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[628] "If formulated on the occasion of the adoption of the text or upon signing the treaty ..." (*Yearbook ... 1966*, vol. II, p. 208).

[629] "In paragraph 2, the phrase 'on the occasion of the adoption of the text' mysteriously disappeared from the Commission's text when it was finally approved by the Conference" (J.M. Ruda, footnote 56 above, p. 195).

[630] See paragraph (5) of the commentary to this guideline.

[631] *Yearbook ... 1966*, vol. II, p. 208. Article 20 of the Vienna Convention relates to acceptance of and objection to reservations.

[632] See the fourth and fifth reports of Reuter, *Yearbook ... 1975*, vol. II, p. 38, and *Yearbook ... 1976*, vol. II (Part One), p. 146.

[633] See the debate on this subject at the 1434th meeting on 6 June 1977, *Yearbook ... 1977*, vol. I, pp. 101–103. The Commission was aware of these risks, but did not believe that it should amend terminology that is now widely accepted.

[634] *Yearbook ... 1982*, vol. II (Part Two), p. 37.

[635] The Chairman of the Drafting Committee, Mr. Al-Khasawneh, stated that a correction had been made to the English text (replacing "by a treaty" with "by the treaty" – *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations*, Vienna, 18 February–21 March 1986, vol. I, *Summary Records* (A/CONF.129/16), 5th plenary meeting, 18 March 1986, records of the Conference, p. 15, para. 63).

[636] See the first report of Sir Humphrey Waldock, *Yearbook ... 1962*, vol. II, p. 66, paragraph (11) of the commentary to draft article 17. See also D.W. Greig, footnote 28 above, p. 28, or F. Horn, footnote 25 above, p. 41.

[637] For example, the practice of the Secretary-General of the United Nations does not draw all the necessary inferences from the 1976 note by the Legal Counsel (see footnote 638 below), since

(9) In legal writings, the rule laid down in article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions now appears to have met with general approval,[639] even if that was not always true in the past.[640] In any case, whatever arguments might be advanced against it, they would not be of such a nature as to call into question the clear-cut rule which is contained in the Vienna Conventions and which the Commission has decided to follow in principle, except in the event of an overwhelming objection.

(10) Although the principle embodied in that provision met with general approval, the Commission asked three questions about:

- the effect of State succession on the implementation of that principle;
- the incomplete list of cases in which a reservation when signing must be confirmed; and, above all;
- whether reference should be made to the "embryo reservations"[641] constituted by some statements made before the signing of the text of the treaty.

(11) It was, for example, asked whether the wording of article 23, paragraph 2, should not be supplemented to take account of the possibility afforded to a successor State to formulate a reservation when it makes a notification of succession in accordance with guideline 1.1,[642] which thus rounds out the definition of reservations contained in article 2, paragraph 1 (d), of the 1986 Convention. In the Commission's opinion, the answer is not very simple. At first glance, the successor State can either confirm or invalidate an existing reservation made by

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the former includes in the valuable on-line publication entitled *Multilateral Treaties Deposited with the Secretary-General* reservations formulated when the treaty was signed, whether or not they were confirmed subsequently, even on the assumption that the State formulated other reservations when expressing its consent to be bound; see, for example, the reservations by Turkey to the Customs Convention on Containers of 2 December 1972 (*Multilateral Treaties ...*, chap. XI-A.115), and pp. 334–346: reservations by Iran (Islamic Republic of) and Peru to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 (*ibid.*, chap. VI.19); such practice probably reflects a purely mechanical approach to the role of the depositary and does not involve any value judgement about the validity or nature of the declarations in question.

[638] See, for example, the aide-memoire of the United Nations Legal Counsel describing the "practice of the Secretary-General in his capacity as depositary of multilateral treaties regarding ... reservations and objections to reservations relating to treaties not containing provisions in that respect", which relied on article 23, paragraph 2, of the 1969 Vienna Convention in concluding that: "If formulated at the time of signature subject to ratification, the reservation has only a declaratory effect, having the same legal value as the signature itself. It must be confirmed at the time of ratification; otherwise, it is deemed to have been withdrawn" (*United Nations Juridical Yearbook*, 1976, p. 219); the Council of Europe changed its practice in this regard in 1980 (cf. F. Horn, footnote 25 above, and Jörg Polakiewicz, Treaty-Making in the Council of Europe, Publications du Conseil de l'Europe, 1999, p. 96) and, in their answers to the Commission's questionnaire on reservations to treaties, the States which indicated that they usually confirmed reservations formulated when the treaty was signed at the time of ratification or accession.

[639] See, in particular, D.W. Greig, footnote 28 above, p. 28; P.-H. Imbert, footnote 25 above, p. 285; A. Pellet and W. Schabas, Commentire de l'article 23 (1969), footnote 450 above, pp. 975 and 1002–1006, paras. 7 and 80–90; and A. Pellet and W. Schabas, 1969 Vienna Convention Article 23, footnote 450 above, pp. 596 and 614–617, paras. 7 and 81–91.

[640] See P.-H. Imbert, footnote 25 above, pp. 253–254.

[641] See paragraph (5) of the commentary to this guideline.

[642] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), p. 196.

the predecessor State[643] or formulate a new reservation when it makes a notification of succession;[644] in neither of these two cases, then, is the successor State led to confirm a reservation when signing. Nevertheless, under article 18, paragraphs 1 and 2, of the 1978 Convention, a newly independent State may, under certain conditions, establish, through a notification of succession, its capacity as a contracting State or party to a multilateral treaty which was not in force on the date of the State's succession and to which the predecessor State was itself a contracting State. Under article 2, paragraph 1 (f), of the 1969 Vienna Convention and article 2, paragraph 1 (k), of the 1978 Convention, however, "'contracting State' means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force" – and not merely a signatory. It follows, conversely, that there can be no "succession to the signing" of a treaty (subject to ratification or an equivalent procedure[645])[646] and that the concept of notification of succession should not be introduced into guideline 2.1.1.[647]

(12) The Commission also questioned whether it might be possible that the number of cases to which article 23, paragraph 2, seems to limit the possibility of subordinating consent to be bound (ratification, act of formal confirmation, acceptance or approval) was too small and did not correspond to the one in article 11. However, the Commission considered that such a concern would be excessive; the differences in wording between article 11 and article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions lie in the omission from the latter of these provisions involving two situations contemplated in the former: "exchange of instruments constituting a treaty" and "any other means if so agreed".[648] The probability that a State or an international organization would subordinate the expression of its consent to be bound by a multilateral treaty subject to reservations to one of these modalities is sufficiently low that it does not seem useful to overburden the wording of guideline 2.2.1 or to include a guideline equivalent to guideline 1.1.2 in chapter 2 of the Guide to Practice.

(13) Thirdly, guideline 2.2.1 does not cover the possible case where a reservation is formulated not at the time of signature of the treaty, but before that. While there is nothing to prevent a State or an international organization from indicating formally to its partners the "reservations" it has with regard to the adopted text at the authentication stage[649] or, for that

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[643] Cf. art. 20, para. 1, of the 1978 Vienna Convention on Succession of States in Respect of Treaties.

[644] Cf. art. 20, para. 2.

[645] See guideline 2.2.2.

[646] See also guideline 5.1.2.

[647] According to Claude Pilloud, "it seems that it should be recognized that, in applying the rule provided for in article 23, paragraph 2, by analogy to reservations expressed when signing, States which have made a declaration of continuity" to the Geneva Conventions of 1949 "should, if they had meant to endorse the reservations expressed [by the predecessor State], so state expressly in their declaration of continuity" ("Les réserves aux Conventions de Genève de 1949", *Revue Internationale de la Croix-Rouge*, March–April 1976, p. 135). It is doubtful whether such an analogy can be made. Concerning reservations in cases of succession of States, see Part 5 of the Guide to Practice.

[648] For a similar comment concerning the comparison of article 2, paragraph 1 (d), and article 11, see para. (12) of the commentary to guideline 1.1.

[649] In addition to signing, moreover, article 10 of the 1969 and 1986 Vienna Conventions mentions initialling and signature *ad referendum* as methods of authenticating the text of a treaty. On authentication "as a distinct part of the treaty-making process", see the commentary to article 9 of the Commission's draft articles on the law of treaties (which became article 10 at the Vienna Conference), *Yearbook ... 1966*, vol. II, p. 195.

matter, at any previous stage of negotiations,[650] such an indication does not correspond to the definition of reservations contained in guideline 1.1.

(14) The Commission had in fact considered that possibility in draft article 19 (which became article 23 of the 1969 Convention), of which paragraph 2, as contained in the initial text of the draft articles adopted in 1966, provided that: "If formulated on the occasion of the adoption of the text ... a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation".[651] Commenting on this provision, the Commission stated that "statements of reservations are made in practice at various stages in the conclusion of the treaty" and explained the reasons why it considered it necessary to confirm reservations on signing when expressing consent to be bound,[652] adding that:

> "Accordingly, a statement during the negotiations expressing a reservation is not, as such, recognized in article 16 [now article 19] as a method of formulating a reservation and equally receives no mention in the present article."[653]

(15) As indicated above,[654] the reference to the adoption of the text disappeared from the text of article 23, paragraph 2, of the 1969 Vienna Convention under "mysterious" circumstances during the 1968–1969 Vienna Conference, probably out of a concern for consistency with the wording of the *chapeau* of article 19. Such a reference might also have led to a proliferation of statements aimed at limiting the treaty's scope before its text was adopted that would not fall within the definition of reservations.

2.2.2 Instances of non-requirement of confirmation of reservations formulated when signing a treaty

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by signature its consent to be bound by the treaty.

Commentary

(1) The solution that was adopted for guideline 2.2.1 and which is faithful to the Vienna text obviously implies that the rule thus codified applies only to treaties in solemn form, which do not enter into force solely by being signed.[655] In the case of treaties not requiring

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[650] See, in this connection, Japan's reservation to article 2 of the Food Aid Convention of 14 April 1971, which was negotiated by that State during the negotiation of the text, announced at the time of signing and formulated at the time of the deposit of the instrument of ratification with the depositary, the Government of the United States, on 12 May 1972.

[651] See *Yearbook ... 1966*, vol. II, p. 208.

[652] See paragraph (5) of the commentary to this guideline.

[653] *Yearbook ... 1996*, vol. II, p. 208, para. (3) of the commentary.

[654] See paragraph (6) of the commentary to this guideline.

[655] On the distinction between treaties in solemn form and agreements in simplified form, see, in particular, C. Chayet, "Les accords en forme simplifiée", *Annuaire Français de Droit International* 1957, pp. 1–13; P. Daillier, M. Forteau and A. Pellet, footnote 254 above, pp. 152–160; P.F. Smets, *La conclusion des accords en forme simplifiée* (Brussels, Bruylant, 1969), p. 284; S. Szurek, Commentaire de l'article 11 (1969), in O. Corten and P. Klein (eds.), *Les Conventions de Vienne sur le droit des traités ...*, footnote 30 above, vol. I, pp. 315–325, paras. 12–23 and C. Van Assche, *Commentaire de l'article 12 (1969)*, *ibid.*, pp. 343–391; and Sandra Szurek, 1969 Vienna Convention Article 11, in Olivier Corten and Pierre Klein (eds), *The*

any post-signature formalities in order to enter into force and which are referred to as "agreements in simplified form",[656] however, it is obvious that, if formulated when the treaty is signed, a reservation produces its effects immediately without any formal confirmation being necessary or even conceivable.

(2) The Commission is not aware of any clear-cut example of a reservation made at the time of signature of a multilateral agreement in simplified form. This eventuality surely cannot be ruled out, however, if only because there are "mixed treaties" that can, if the parties so choose, enter into force solely upon signature or following ratification and which are subject to reservations or contain reservation clauses.[657]

(3) In fact, this rule derives, *a contrario*, from the text of article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions reproduced in guideline 2.2.1. In view of the practical nature of the Guide to Practice, however, the Commission found that it would not be superfluous to clarify this expressly in guideline 2.2.2.

(4) The Commission chose not to use in this guideline the term "agreements in simplified form", which is commonly used in French writings but does not appear in the Vienna Conventions.

(5) One might also ask whether a reservation to a treaty provisionally entering into force or provisionally implemented pending its ratification[658] — and hypothetically formulated at the time of signature — must be confirmed at the time of its author's expression of consent to be bound by the treaty. The Commission took the view that that case was different from the one covered by guideline 2.2.2 and that there was no reason for a solution departing from the principle laid down in guideline 2.2.1. Accordingly, a separate guideline does not appear to be necessary.

2.2.3 Reservations formulated upon signature when a treaty expressly so provides

Where the treaty expressly provides that a State or an international organization may formulate a reservation when signing the treaty, such a reservation does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

Vienna Conventions on the Law of Treaties ..., footnote 30 above, vol. I, pp. 193–199, paras. 14–30 and Cedric Van Assche, 1969 Vienna Convention Article 12, *ibid.*, pp. 209–242.

[656] While the procedure involving agreements in simplified form is more commonly used for concluding bilateral rather than multilateral treaties, it is not at all unknown in the second case and major multilateral agreements may be cited which have entered into force solely by being signed. This is true, for example, of the 1947 General Agreement on Tariffs and Trade (at least in terms of the entry into force of the bulk of its provisions following the signing of the Protocol of Provisional Application), the Geneva Declaration on the Neutrality of Laos of 23 July 1962, the Agreement establishing a Food and Fertilizer Technology Centre for the Asian and Pacific Region of 11 June 1969 and the Agreement instituting the Order of the Caribbean Community of 26 February 1991.

[657] Cf. article XIX of the Agreement of 20 August 1971 concerning the International Telecommunications Satellite Organization (Intelsat); see also the 1971 Convention on Psychotropic Substances (art. 32), the Code of Conduct for Liner Conferences of 6 April 1974, the 1992 Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (art. 8, para. 4), the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea (art. 4, para. 3 (a)), the 1999 International Convention on Arrest of Ships (art. 12, para. 2) and the 2001 Multilateral Agreement on the liberalization of international air transportation (art. 20, para. 2).

[658] Cf. articles 24 and 25 of the 1969 and 1986 Vienna Conventions.

Commentary

(1) Alongside the case described in guideline 2.2.2, there exists another hypothetical case in which the confirmation of a reservation formulated when signing appears to be superfluous, namely, where the treaty itself provides expressly for such a possibility without requiring confirmation. For example, article 8, paragraph 1, of the 1963 Council of Europe Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality provides that:

> "Any Contracting Party may, when *signing this Convention* or depositing its instrument of ratification, acceptance or accession, declare that it avails itself of one or more of the reservations provided for in the Annex to the present Convention."[659]

(2) In a case of this kind, it seems that practice consists of not requiring a party that formulates a reservation when signing to confirm it when expressing consent to be bound. Thus, France made a reservation when it signed the 1963 Convention and did not subsequently confirm it.[660] Similarly, Hungary and Poland did not confirm their reservation to article 20 of the 1984 Convention against Torture, article 28, paragraph 1, of which provides that such a reservation may be made when signing. Luxembourg also did not confirm the reservation it made to the Convention relating to the Status of Refugees of 28 July 1951,[661] and Ecuador did not confirm its reservation to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, of 17 December 1973.[662] It is true, however, that other States[663] nonetheless did confirm their reservation at the time of ratification.

(3) The rule embodied in article 23, paragraph 2, of the Vienna Conventions, which, like all their provisions, is only dispositive in nature, should be applicable only where a treaty is silent; otherwise, the provisions offering the possibility of reservations at the time of signature would serve no useful purpose. One may think that the uncertainties of practice can be explained by the fact that, if a formal confirmation is not essential in a case of this kind, it is also not ruled out: reservations made when signing an agreement expressly authorizing reservations upon signature are sufficient in and of themselves, it nevertheless being understood that nothing prevents reserving States from confirming them,[664] even if nothing compels them to do so.

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[659] Emphasis added. See also, among many examples, article 17 of the 1961 New York Convention on the Reduction of Statelessness, United Nations, *Treaty Series*, vol. 989, p. 175, article 30 of the 1988 Council of Europe Convention on Mutual Administrative Assistance on Tax Matters (*ETS*, No. 127), article 29 of the 1997 European Convention on Nationality (*ETS*, No. 166) and article 24 of the 1989 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons (Hague Conference on Private International Law, Proceedings of the Sixteenth Session, vol. II, 1990, p. 526).

[660] Council of Europe, European Committee on Legal Cooperation (CCJ), CCJ *Conventions and reservations to those Conventions*, Note by the Secretariat, CCJ (99) 36, Strasbourg, 30 March 1999, p. 11; the same applied to Belgium's reservations to the 1988 Convention on Mutual Administrative Assistance on Tax Matters (*ibid.*, p. 55).

[661] *Multilateral Treaties* ..., chap. V.2. The Hungarian reservation was subsequently withdrawn.

[662] *Ibid.*, chap. XVIII.7.

[663] Belarus, Bulgaria (reservation subsequently withdrawn), Czechoslovakia (reservation subsequently withdrawn by the Czech Republic and Slovakia), Morocco, Tunisia and Ukraine (reservation subsequently withdrawn); see *ibid.*, chap. V.2.

[664] And such "precautionary confirmations" are quite common (see, for example, the reservations by Belarus, Brazil (which nevertheless confirmed only two of its three initial reservations), Hungary, Poland, Turkey and Ukraine to the 1971 Convention on Psychotropic Substances, *ibid.*, chap. VI.16).

(4) Accordingly, guideline 2.2.3 endorses the "minimum" practice, which would seem logical, since the treaty expressly provides for reservations at the time of signature. If this principle were not recognized, many unconfirmed reservations formulated when signing would have to be deemed without effect, even where the States that formulated them did so on the basis of the text of the treaty itself.

2.2.4 Form of formal confirmation of reservations

The formal confirmation of a reservation must be made in writing.

Commentary

(1) Article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions on "Procedure regarding reservations" does not expressly require reservations to be confirmed in writing. However, this provision, which is reproduced in guideline 2.2.1, does require that a reservation must be formally confirmed by the reserving State [or international organization] when expressing its consent to be bound by the treaty. The word "formally" must without any doubt be understood as meaning that this formality must be completed in writing.

(2) This interpretation is also consistent with the *travaux préparatoires* for article 23: it is precisely because the confirmation must be made in writing that the Commission and its Special Rapporteurs on the law of treaties took the view that the question whether a reservation may initially be formulated orally could be left open.[665]

(3) The requirement of a written confirmation of a reservation is also a matter of common sense: a reservation could not be notified with any certainty to the other States and international organizations concerned, in accordance with the provisions of article 23, paragraph 1, if no formal text existed. This is, moreover, in keeping with a consistent practice to which there is, to the Commission's knowledge, no exception.

(4) It should, however, be pointed out that guideline 2.2.4 does not take a position on the question whether the formal confirmation of a reservation is always necessary. This is decided by guidelines 2.2.2 and 2.2.3, which show that there are cases that do not lend themselves to such a confirmation.

2.3 Late formulation of reservations

A State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty, unless the treaty otherwise provides or none of the other contracting States and contracting organizations opposes the late formulation of the reservation.

Commentary

(1) Chapter 2, section 3, of the Guide to Practice is devoted to the particularly sensitive issue of what are commonly called "late reservations". The Commission has preferred to speak of the "late formulation of reservations", however, in order to indicate clearly that what is meant is not a new or separate category of reservations, but, rather, declarations which are presented as reservations but which are not in keeping with the time periods during which they

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[665] See paragraphs (8) and (10) of the commentary to guideline 2.1.1.

may, in principle, be considered as such, since the times at which reservations may be formulated are specified in the definition of reservations itself.[666]

(2) Unless otherwise provided by a treaty, something which is always possible,[667] the expression of consent to be bound constitutes, for the contracting States and organizations, the last (and, in view of the requirement of formal confirmation of reservations formulated during negotiations and upon signature, the only) time when a reservation may be formulated. This rule, which is unanimously recognized in legal writings[668] and which arises from the very definition of reservations[669] and is also implied by the *chapeau* of article 19 of the 1969 and 1986 Vienna Conventions, is widely observed in practice.[670] It was regarded as forming part of positive law by the International Court of Justice in its judgment of 20 December 1988 in the *Border and Transborder Armed Actions* case:

> "... Article LV of the Pact of Bogota enables the parties to make reservations to that instrument which 'shall, with respect to the State that makes them, apply to all signatory States on the basis of reciprocity'. In the absence of special procedural provisions, those reservations may, in accordance with the rules of general international law on the point as codified by the 1969 Vienna Convention on the Law of Treaties, be made only at the time of signature or ratification of the pact or at the time of adhesion to that instrument."[671]

(3) It is not uncommon for a State[672] to try to formulate a reservation at a time other than that provided for by the Vienna definition, and this possibility, which may have some definite advantages, has not been totally ruled out by practice, particularly as the principle that a reservation may not be formulated after expression of consent to be bound "is not absolute. It applies only if the contracting States do not authorize by agreement the formulation, in one

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[666] Cf. articles 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions on the Law of Treaties, article 2, paragraph 1 (j), of the 1978 Vienna Convention on Succession of States in respect of Treaties, and guideline 1.1 "'Reservation' means a unilateral statement [...] made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty [...]".

[667] Some reservation clauses specify, for example, that "reservations to one or more of the provisions of this Convention may be made at any time prior to ratification of or accession to this Convention ..." (Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy) or "at the latest at the moment of ratification or at adhesion, each State may make the reserves contemplated in articles ..." (Hague Convention of 5 October 1961 concerning the protection of infants; these examples are quoted by P.-H. Imbert, footnote 25 above, pp. 163–164); see also the examples given in paragraph (4) of this commentary.

[668] It has been stated particularly forcefully by Gaja: "The latest moment in which a State may make a reservation is when it expresses its consent to be bound by a treaty" (G. Gaja, footnote 28 above, p. 310).

[669] See paragraph (7) of the commentary to guideline 1.1.

[670] Moreover, this explains why States sometimes try to get round the prohibition on formulating reservations after the entry into force of a treaty by calling unilateral statements "interpretative declarations", which actually match the definition of reservations (see paragraph (27) of the commentary to guideline 1.2, "Definition of interpretative declarations").

[671] *I.C.J. Reports 1988*, p. 85.

[672] To the Commission's knowledge, there has been no instance of the late formulation of a reservation by an international organization to date.

form or another, of new reservations"[673] or restrict further the times at which a reservation is possible.

(4) Although the possibility of the late formulation of a reservation "has never been contemplated, either in the context of the International Law Commission or during the Vienna Conference",[674] it is relatively frequent.[675] Thus, for example, article 29 of the Convention of 23 July 1912 on the Unification of the Law relating to Bills of Exchange provided that:

> "The State which desires to avail itself of the reservations in Article 1, paragraph 2, or in Article 22, paragraph 1, must specify the reservation in its instrument of ratification or adhesion ...
>
> The contracting State which *hereafter* desires to avail itself of the reservations[676] above mentioned, must notify its intention in writing to the Government of the Netherlands ..."[677]

Likewise, under article XXVI of the 1955 Hague Protocol to amend the Convention for the Unification of certain rules relating to international carriage by air signed at Warsaw on 12 October 1929:[678]

> "No reservation may be made to this Protocol except that a State may at any time declare by a notification addressed to the Government of the People's Republic of Poland that the Convention as amended by this Protocol shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities."

Article 38 of the Hague Convention of 2 October 1973 concerning the International Administration of the Estates of Deceased Persons provides that:

> "A Contracting State desiring to exercise one or more of the options envisaged in Article 4, the second paragraph of Article 6, the second and third paragraphs of Article 30 and Article 31, shall notify this to the Ministry of Foreign Affairs of the Netherlands, either at the time of the deposit of its instrument of ratification, acceptance, approval or accession *or subsequently*."[679]

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[673] J.-F. Flauss, "Le contentieux de la validité des réserves à la CEDH devant le Tribunal fédéral suisse: Requiem pour la déclaration interprétative relative à l'article 6, par. 1," *Revue Universelle des Droits de l'Homme*, 1993, p. 302.

[674] P.-H. Imbert, footnote 25 above, p. 12, note 14.

[675] See also the examples given by P.-H. Imbert, *ibid.*, pp. 164–165.

[676] In fact, what is meant here is not *reservations*, but *reservation clauses*.

[677] See also article 1, paragraphs 3 and 4, of the Convention of 7 June 1930 Providing a Uniform Law for Bills of Exchange and Promissory Notes and article 1, paragraphs 3 and 4, of the Convention of 19 March 1931 providing a Uniform Law for Cheques: "... the reservations referred to in Articles ... may, however, be made after ratification or accession, provided that they are notified to the Secretary-General of the League of Nations ..."; "Each of the High Contracting Parties may, in urgent cases, make use of the reservations contained in Articles ... even after ratification or accession ...".

[678] United Nations, *Treaty Series*, vol. 478, p. 389.

[679] See also article 26 of the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes: "A Contracting State having at the date of the entry into force of the Convention for that State a complex system of national allegiance may specify *from time to time* by declaration how a reference to its national law shall be construed for the purposes of the Convention". This provision may refer to an interpretative declaration rather than to a reservation.

Under article 30, paragraph 3, of the Council of Europe Convention on Mutual Administrative Assistance on Tax Matters of 25 January 1988:

> "After the entry into force of the Convention in respect of a Party, that Party may make one or more of the reservations listed in paragraph 1 which it did not make at the time of ratification, acceptance or approval. Such reservations shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of the reservation by one of the Depositaries."[680]

Similarly, article 10, paragraph 1, of the International Convention on Arrest of Ships of 12 March 1999 provides that:

> "Any State may, at the time of signature, ratification, acceptance, or accession, or at any time thereafter, reserve the right to exclude the application of this Convention to any or all of the following: ..."

(5) This is not especially problematic in itself and is consistent with the idea that the Vienna rules are only of a residual nature (as the guidelines in the Guide to Practice are). However, since what is involved is a derogation from a rule now accepted as customary and enshrined in the Vienna Conventions, it would seem imperative that express provision should be made for such a derogation in the treaty. The Commission wanted to clarify this principle in the text of guideline 2.3, although this was not legally indispensable in order to emphasize the exceptional character that the late formulation of reservations should have.

(6) It is true that the European Commission of Human Rights was flexible in this respect, having appeared to rule that a State party to the Rome Convention could invoke the amendment of national legislation covered by an earlier reservation to modify at the same time the scope of that reservation without violating the time limit placed on the option of formulating reservations by article 57 (former article 64) of the Convention. The scope of this precedent[681] is unclear, however, and it may be that the Commission took this position because, in reality, the amendment of the legislation did not in fact result in an additional limitation on the obligations of the State concerned.[682]

(7) Whatever the case, the requirement that there should be a clause expressly authorizing the formulation of a reservation after expression of consent to be bound seems all the more crucial given that it was necessary, for particularly pressing practical reasons, which the Commission has discussed in its commentary to guideline 1.1, to include a time limit in the definition of reservations itself: "[t]he idea of including time limits on the possibility of making reservations in the definition of reservations itself has progressively gained ground, given the magnitude of the drawbacks in terms of stability of legal relations of a system that would allow parties to formulate a reservation at any moment. It is in fact the principle *pacta*

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[680] This Convention entered into force on 1 April 1995. See also article 5 of the 1978 Additional Protocol to the European Convention on Information on Foreign Law, "[a]ny Contracting Party which is bound by the provisions of both chapters I and II may at any time declare by means of a notification addressed to the Secretary General of the Council of Europe that it will only be bound by one or the other of chapters I and II. Such notification shall take effect six months after the date of the receipt of such notification".

[681] See, for instance, *Association X v. Austria*, application 473/59, *Yearbook of the European Convention on Human Rights* No. 2, p. 405; *X v. Austria*, application 1731/62, *ibid.*, No. 7, p. 192; or *X v. Austria*, application 8180/78, DR 20, p. 26.

[682] In case 1731/62, the Commission took the view that "the reservation made by Austria on 3 September 1958 ... covers the law of 5 July 1962, *the result of which was not to enlarge* a posteriori *the field removed from the control of the Commission*", *Yearbook of the European Convention on Human Rights* No. 7, p. 202 (emphasis added).

sunt servanda itself which would be called into question, in that at any moment a party to a treaty could, by formulating a reservation, call its treaty obligations into question; in addition, this would excessively complicate the task of the depositary."[683] Because the late formulation of reservations should be avoided as much as possible, the words "Unless the treaty provides otherwise" at the beginning of guideline 2.3 should be interpreted narrowly.

(8) The existence of express provisions is not, however, the only exception to the rule that a reservation must, in principle, be made not later than the time at which consent to be bound is expressed.

(9) It emerges from current practice that the other contracting States or contracting organizations may unanimously accept a late reservation, and this consent (which may be tacit) can be seen as a collateral agreement extending *ratione temporis* the option of formulating reservations – if not reservations to the treaty concerned in general, then at least the reservation or reservations in question.

(10) This possibility has been seen as translating the principle that "the parties are the ultimate guardians of a treaty and may be prepared to countenance unusual procedures to deal with particular problems".[684] In any event, as has been pointed out, "[t]he solution must be understood as dictated by pragmatic considerations. A party remains always[685] at liberty to accede anew to the same treaty, this time by proposing certain reservations. As the result will remain the same whichever of these two alternatives one might choose, it seemed simply more expedient to settle for the more rapid procedure ...".[686] [687]

(11) Initially, the Secretary-General of the United Nations, in keeping with his great caution in this area since the 1950s, had held to the position that "[i]n accordance with established international practice to which the Secretary-General conforms in his capacity as depositary, a reservation may be formulated only at the time of signature, ratification or accession", and he had consequently taken the view that a party to the Convention on the Elimination of All Forms of Racial Discrimination which did not make any reservations at the time of ratification was not entitled to make any later.[688] Two years later, however, he softened his position considerably in a letter to the Permanent Mission of France to the United Nations,[689] which was considering the possibility of denouncing the Convention of 1931 providing a Uniform Law for Cheques with a view to reacceding to it with new reservations. Taking as a basis "the general principle that the parties to an international agreement may, by unanimous decision, amend the provisions of an agreement or take such measures as they deem appropriate with respect to the application or interpretation of that agreement", the Legal Counsel states:

> "Consequently, it would appear that your Government could address to the Secretary-General, over the signature of the Minister for Foreign Affairs, a letter communicating the proposed reservation together with an indication of the date, if any, on which it is decided that it should take effect. The proposed reservation would be communicated to the States concerned (States parties, Contracting States and signatory States) by the Secretary-General and, in the absence of any objection by States parties within 90 days from the date of that communication (the period traditionally set,

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[683] Paragraph (7) of the commentary to guideline 1.1.

[684] D.W. Greig, footnote 28 above, pp. 28–29.

[685] According to the Commission, it is doubtful that this is always the case.

[686] F. Horn, footnote 25 above, p. 43.

[687] * [applies only to French text] See footnote 685 above.

[688] Memorandum to the Director of the Division of Human Rights, 5 April 1976, *United Nations Juridical Yearbook*, 1976, p. 221.

[689] F. Horn, footnote 25 above, p. 42.

according to the practice of the Secretary-General, for the purpose of tacit acceptance and corresponding, in the present case, to the period specified in the third paragraph of article 1 of the [1931] Convention for acceptance of the reservations referred to in articles 9, 22, 27 and 30 of annex II), the reservation would be considered to take effect on the date indicated."[690]

(12) That is what happened: on 7 February 1979, the French Government addressed to the Secretary-General a letter drafted in accordance with this information; the Secretary-General circulated this letter on 10 February and "[s]ince no objections by the Contracting States were received within 90 days from the date of circulation of this communication ... the reservation was deemed accepted and took effect on 11 May 1979".[691]

(13) Since then, the Secretary-General of the United Nations appears to have adhered continuously to this practice in the performance of his functions as depositary.[692] It was formalized in a legal opinion of the Secretariat of 19 June 1984 to the effect that "the parties to a treaty may always decide, *unanimously*, at any time, to accept a reservation in the absence of, or even contrary to, specific provisions in the treaty" and irrespective of whether the treaty contains express provisions as to when reservations may be formulated.[693]

(14) This practice is not limited to the treaties of which the Secretary-General is the depositary. In the above-mentioned 1978 legal opinion,[694] the Legal Counsel of the United Nations referred to a precedent involving a late reservation to the Customs Convention of 6 October 1960 on the Temporary Importation of Packings, which was deposited with the Secretary-General of the Customs Cooperation Council and article 20 of which "provides that any Contracting Party may, at the time of signing and ratifying the Convention, declare that it does not consider itself bound by article 2 of the Convention. Switzerland, which had ratified the Convention on 30 April 1963, made a reservation on 21 December 1965 which was

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[690] Letter dated 14 September 1978, *United Nations Juridical Yearbook*, 1978, pp. 199–200.

[691] *Multilateral Treaties* ..., part II, 11; curiously, the Government of the Federal Republic of Germany expressly stated, on 20 February 1980, that it "raise[d] no objections thereto" (*ibid.*).

[692] In addition to the examples given by G. Gaja, footnote 28 above, p. 311, see, for instance, Belgium's reservation (which in fact amounts to a general objection to the reservations formulated by other parties) to the 1969 Convention on the Law of Treaties: while this country had acceded to the Convention on 1 September 1992, "[o]n 18 February 1993, the Government of Belgium notified the Secretary-General that its instrument of accession should have specified that the said accession was made subject to the said reservation. None of the Contracting Parties to the Agreement having notified the Secretary-General of an objection either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of its circulation (23 March 1993), the reservation is deemed to have been accepted" (*Multilateral Treaties* ..., chap. XXIII.1). See also the reservation formulated late by Mozambique to the United Nations Convention against Corruption, which was accepted for deposit in 2009: "Within a period of one year from the date of the depositary notification transmitting the reservation (C.N.834.2008.TREATIES-32 of 5 November 2008), none of the Contracting Parties to the said Convention had notified the Secretary-General of an objection either to the deposit itself or to the procedure envisaged. Consequently, the reservation in question was accepted for deposit upon the above-stipulated one-year period, that is, on 4 November 2009" (*ibid.*, chap. XVIII.14). See also P.T.B. Kohona, "Some Notable Developments, footnote 582 above, pp. 433–450, and "Reservations: Discussion of Recent Developments ..., footnote 582 above, pp. 415–450.

[693] Letter to a government official of a Member State, *United Nations Juridical Yearbook*, 1984, p. 183; the italics are contained in the original text.

[694] Para. (11) of the commentary to this guideline.

submitted by the depositary to the States concerned and, in the absence of any objection, was considered accepted with retroactive effect to 31 July 1963".[695]

(15) Several States parties to the 1978 Protocol to the International Convention of 1973 for the Prevention of Pollution from Ships (MARPOL), which entered into force on 2 October 1983, have broadened the scope of their earlier reservations[696] or added new reservations after expressing their consent to be bound.[697] Likewise, late reservations to certain conventions of the Council of Europe have been formulated without any opposition being raised.[698]

(16) As these examples show, reservations formulated late are deemed to have been legitimately made if the other contracting States and contracting organizations consulted by the depositary do not voice any opposition. But they also show that the cases involved have almost always been fairly borderline ones: either the delay in communicating the reservation was minimal or the notification occurred after ratification but prior to entry into force of the treaty for the reserving State,[699] or else the planned reservation was duly published in the official publications but "forgotten" at the time of deposit of the instrument of notification, something that can be regarded, albeit just barely, as "rectification of a material error".

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[695] Letter to the Permanent Mission of a Member State to the United Nations, 14 September 1978, *United Nations Juridical Yearbook*, 1978, pp. 199–200.

[696] France (ratification 25 September 1981; amendment 11 August 1982: IMO, Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions as at 31 May 2011, p. 119).

[697] Liberia (ratification 28 October 1980, new reservations 27 July 1983, subject of a *procès-verbal* dated 31 August 1983), *ibid.*, p. 121; Romania (accession 8 March 1993, rectified subsequently, in the absence of any objection, to include reservations adopted by Parliament), *ibid.*, p. 124; United States of America (ratification 12 August 1980, reservations communicated 27 July 1983, subject of a *procès-verbal* of rectification dated 31 August 1983), *ibid.*, p. 127. In the case of Liberia and the United States, the French Government stated that, in view of their nature, it had no objection to those rectifications, but such a decision could not constitute a precedent.

[698] See, for example, Greece's reservation to the European Convention on the Suppression of Terrorism of 27 January 1977 (ratification 4 August 1988; rectification communicated to the Secretary-General 5 September 1988. Greece invoked an error; the reservation expressly formulated in the act authorizing ratification had not been transmitted. *STE* No. 90, available at http://conventions.coe.int); Portugal's reservations to the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters (deposit of the instrument of ratification 27 September 1994; entry into force of the Convention for Portugal 26 December 1994; notification of reservations and declarations 19 December 1996. In this case, too, Portugal invoked an error due to the non-transmission of the reservations contained in the Assembly resolution and the Decree of the President of the Republic published in the Official Gazette of the Portuguese Republic (*STE* No. 30, http://conventions.coe.int); the "declaration" by the Netherlands of 14 October 1987 restricting the scope of its ratification (on 14 February 1969) of the European Convention on Extradition of 13 December 1957 (*STE* No. 24, http://conventions.coe.int); or the reservation formulated by South Africa to the same instrument (*ibid.*; South Africa explained in a *note verbale*: "The Embassy of the Republic of South Africa regrets the belated communication of the reservation and declaration regarding the European Convention on Extradition, which is the result of an unfortunate administrative oversight."). See also the example of the late formulation of reservations by Belgium and Denmark to the European Agreement on the Protection of Television Broadcasts cited by G. Gaja, footnote 28 above, p. 311).

[699] In this connection, Gaja (*ibid.*) cites two reservations added on 26 October 1976 by the Federal Republic of Germany to its instrument of ratification (dated 2 August 1976) of the Convention of 1954 relating to the Status of Stateless Persons (cf. *Multilateral Treaties* ..., chap. V.3).

(17) A publication by the Council of Europe emphasizes the exceptional nature of the derogations permitted within that organization from the agreed rules on formulating reservations: "Accepting the belated formulation of reservations may create a dangerous precedent which could be invoked by other States in order to formulate new reservations or to widen the scope of existing ones. Such practice would jeopardize legal certainty and impair the uniform implementation of European treaties."[700] For the same reasons, some authors are reluctant to acknowledge the existence of such a derogation from the principle of the limitation *ratione temporis* of the possibility of formulating reservations.[701]

(18) These are also the reasons that led the Commission to consider that particular caution should be shown in sanctioning a practice which ought to remain exceptional and narrowly circumscribed. Accordingly, it decided to give a negative formulation to the rule contained in guideline 2.3: the principle is, and must remain, that the late formulation of a reservation is not valid; it may become so, in the most exceptional cases, only if none of the other contracting States or other contracting organizations "opposes the late formulation of the reservation".[702]

(19) Yet it is a fact that "[a]ll the instances of practice here recalled point to the existence of a rule that allows States to make reservations even after they have expressed their consent to be bound by a treaty, provided that the other contracting States acquiesce to the making of reservations at that stage".[703] In truth, it is difficult to imagine what might prevent all the contracting States and organizations from agreeing to such a derogation, whether this agreement is seen as an amendment to the treaty or as the mark of the "collectivization" of control over the permissibility of reservations.[704]

(20) It is this requirement of unanimity, be it passive or tacit,[705] that makes the exception to the principle acceptable and limits the risk of abuse. It is an indissociable element of this derogation, observable in current practice and consistent with the role of "guardian" of the treaty that States parties may collectively assume.[706] But this requirement is not meaningful nor does it fulfil its objectives unless a single opposition renders the formulation of the reservation impossible; failing this, the very principle established in the first sentence of article 19 of the 1969 and 1986 Vienna Conventions would be reduced to nothing: any State or organization could add a new reservation to its acceptance of a treaty at any time because there was always sure to be another contracting State or organization that would not oppose it, and the situation would revert to the one in which States or international organizations find themselves at the time they become parties, when they enjoy broad scope for formulating reservations, subject only to the limits set in articles 19 and 20.

(21) The caution demonstrated in practice and the clarifications provided on several occasions by the Secretary-General, together with doctrinal considerations and concerns relating to the maintenance of legal certainty, justify, in this particular instance, the strict

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[700] J. Polakiewicz, footnote 638 above, p. 94.

[701] Cf. R.W. Edwards, footnote 59 above, p. 383, or R. Baratta, *Gli effetti delle riserve ai trattati* (Milan, Giuffrè, 1999), p. 27, note 65.

[702] Regarding this wording, see paragraph (24) of the commentary to this guideline.

[703] G. Gaja, footnote 28 above, p. 312.

[704] This "control" must, of course, be exercised in conjunction with the "organs of control", where they exist. In the *Chrysostomos* and *Loizidou* cases, control by States over the permissibility *ratione temporis* of reservations (introduced by Turkey by means of an optional statement accepting individual petitions) was superseded by the organs of the European Convention on Human Rights (see paragraphs (5) and (6) of the commentary to guideline 2.3.3).

[705] Guidelines 2.3.1 and 2.3.2 explain the terms and conditions concerning the acceptance of the late formulation of a reservation.

[706] See paragraph (10) of the commentary to the present guideline.

application of the rule of unanimity, it being understood that, contrary to the traditional rules applicable to all reservations (except in Latin America), this unanimity concerns the acceptance of (or at least the absence of any objection to) reservations that are formulated late. It is without effect, however, on the participation of the reserving State (or international organization) in the treaty itself: in the event of an objection, it remains bound, in accordance with the initial expression of its consent, and it can opt out (with a view to reacceding subsequently and formulating anew the rejected reservations) only in accordance with either the provisions of the treaty itself or the general rules codified in articles 54 to 64 of the Vienna Conventions.

(22) Nevertheless, a distinction should be drawn between, on the one hand, oppositions to the late formulation of a reservation and, on the other hand, traditional objections, such as those that can be made to reservations pursuant to article 20, paragraph 4 (b), of the 1969 and 1986 Vienna Conventions. This distinction appears to be necessary, for it is hard to see why co-contracting States or international organizations should only have a choice between all or nothing – that is to say, either accepting both the reservation itself and its lateness or preventing the State or organization that formulated a late reservation from doing so, even though the author of the late reservation may have reasons for doing so that are acceptable to its partners. Furthermore, in the absence of such a distinction, States and international organizations that have not yet expressed their consent to be bound by the treaty at the time the late reservation is formulated but which do so subsequently through accession or other means would be confronted with a *fait accompli*. Paradoxically, they could not object to a reservation formulated late, whereas they are permitted to do so under article 20, paragraph 5,[707] relating to reservations formulated when the reserving State expresses its consent to be bound.[708]

(23) The unanimous consent of the other contracting States and organizations should therefore be regarded as necessary for the late formulation of reservations. On the other hand, the normal rules regarding acceptance of and objections to reservations, as codified in articles 20 to 23 of the Vienna Conventions, must be applicable with regard to the actual content of late reservations, to which the other parties should be able to object "as usual".

(24) In view of this possibility, which cannot be ruled out, at least intellectually (even if it does not seem to have been used in practice to date,[709] the Commission chose to use the term "oppose", which focuses on the rejection, in principle, of a reservation on account of its late formulation, while reserving the term "objection" to designate declarations that meet the definition in guideline 2.6.1, once the lateness of the formulation has been accepted by all the contracting States and organizations.

2.3.1 Acceptance of the late formulation of a reservation

Unless the treaty otherwise provides or the well-established practice followed by the depositary differs, the late formulation of a reservation shall only be deemed to have been accepted if no contracting State or contracting organization has opposed such formulation after the expiry of the twelve-month period following the date on which notification was received.

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[707] "... a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation or *by the date on which it expressed its consent to be bound by the treaty, whichever is later*" (emphasis added); see guideline 2.6.12.

[708] It would be equally paradoxical to allow States or international organizations which become parties to the treaty after the reservation is entered to object to it under article 20, paragraph 4 (b), whereas the original parties cannot do so.

[709] Some late reservations have, however, been expressly accepted. (For an example, see footnote 691 above).

Commentary

(1) The purpose of guideline 2.3.1 is to clarify and supplement the last phrase of guideline 2.3, which rules out any possibility of the late formulation of a reservation "unless the treaty otherwise provides or none of the other contracting States and contracting organizations opposes the late formulation of the reservation".

(2) According to the prevailing opinion and in keeping with practice, an express acceptance of late reservations is not necessary; just as reservations formulated within the set periods may be accepted tacitly,[710] it should likewise be possible for late reservations to be accepted in that manner (whether it is their late formulation or their content that is at issue), and for the same reasons. It seems fairly clear that to require express unanimous consent would rob of any substance the possibility, even if strictly circumscribed, of the late formulation of a reservation with the unanimous consent of the other contracting States and organizations, since the express acceptance of reservations at any time is almost unheard of in practice. In fact, requiring such acceptance would be tantamount to ruling out any possibility of the late formulation of a reservation. It is hardly conceivable that all the contracting States to a universal treaty would expressly accept such a request within a reasonable period of time.

(3) Moreover, that would call into question the practice followed by the Secretary-General of the United Nations and by the secretaries-general of the Customs Cooperation Council (World Customs Organization (WCO)), the International Maritime Organization (IMO) and the Council of Europe,[711] all of whom have considered that certain reservations formulated late had entered into force in the absence of objections from the other contracting States and organizations.

(4) It remains to be determined, however, how much time the other contracting States and organizations have to oppose the late formulation of a reservation. There are two conflicting sets of considerations in this regard. On the one hand, it must be left to the other contracting States and organizations to examine the planned reservation and respond to it; on the other, a long period of time extends the period of uncertainty about the fate of the reservation (and therefore of contractual relations).

(5) Practice in this respect is ambiguous. It seems that the secretaries-general of IMO, the Council of Europe and WCO have proceeded in an empirical manner and have not set any specific periods when they consulted the other contracting States.[712] That was not the case with the Secretary-General of the United Nations.

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[710] Cf. article 20, paragraph 5, of the Vienna Conventions (1986 text): "unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of the period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty". See also guideline 2.8.1.

[711] See paragraphs (11) to (15) of the commentary to guideline 2.3.

[712] It would appear, however, that the Secretary-General of IMO considers that, in the absence of a response within one month following notification, the reservation becomes effective (cf. footnote 697 above and IMO, *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions as at 31 May 2011*, p. 121, concerning the reservation of Liberia, and p. 127, concerning that of the United States of America).

(6) Initially, when the current practice of the Secretary-General began in the 1970s, the parties were given a period of 90 days in which to oppose the late formulation of a reservation, if they wished to do so. Yet the choice of this period seems to have been somewhat circumstantial: it happens to have coincided with the period provided for in the relevant provisions of the 1931 Convention for the Settlement of Certain Conflicts of Laws in connection with Cheques, to which France wanted to make a new reservation.[713] That notwithstanding, the 90-day period was adopted whenever a State availed itself thereafter of the opportunity to formulate a new reservation, or modify an existing one, after the entry into force with respect to that State of a new treaty of which the Secretary-General was the depositary.[714]

(7) In practice, however, this 90-day period proved to be too short; owing to delays in the transmission to States of the communication by the Office of the Legal Counsel, States had very little time in which to examine these notifications and respond to them, although such communications are likely to raise "complex questions of law" for the parties to a treaty, requiring "consultations among them, in deciding what, if any, action should be taken in respect of such a communication".[715] It is significant, moreover, that, in the few situations in which parties took action, their actions were formulated well after the 90-day period that had theoretically been set for them.[716] It was for this reason that, after receiving a *note verbale* from Portugal on behalf of the European Union describing difficulties linked to the 90-day period, the Secretary-General announced, in a circular addressed to all Member States, a change in the practice in that area. From then on,

> "if a State which had already expressed its consent to be bound by a treaty formulated a reservation to that treaty, the other parties would have a period of 12 months after the Secretary-General had circulated the reservation to inform him that they wished to object to it".[717]

(8) In taking this decision, which is also applicable to the amendment of an existing reservation, "the Secretary-General [was] guided by article 20, paragraph 5, of the [Vienna] Convention, which indicates a period of twelve months to be appropriate for Governments to analyse and assess a reservation that has been formulated by another State and to decide upon what action, if any, should be taken in respect of it".[718]

(9) The drawback to this period is that during the twelve months following notification by the Secretary-General total uncertainty prevails as to the fate of the reservation that has been formulated, since the opposition of a single State at the last minute is sufficient for the reservation to be considered as not having been formulated in a valid manner. Nevertheless, taking into account the provisions of article 20, paragraph 5, of the Vienna Conventions and the current practice of the Secretary-General, the Commission considered that it made more sense to bring its own position — which, in any event, has to do with progressive development and not with codification in the strict sense — into line with those intentions.

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[713] See paragraphs (11) and (12) of the commentary to guideline 2.3.

[714] *Ibid.*, paragraph (13).

[715] Memorandum from the United Nations Legal Counsel addressed to the Permanent Representatives of States Members of the United Nations, 4 April 2000 (LA 41 TR/221 (23-1)).

[716] Cf. the response by Germany to the French reservation to the 1931 Convention on Cheques, issued one year following the date of the French communication (see footnote 691 in the commentary to guideline 2.3.1).

[717] See footnote 715 above.

[718] *Ibid.*

(10) Likewise, in view of the different practices followed by other international organizations acting as depositaries,[719] the Commission took the view that it would be wise to reserve the possibility for a depositary to maintain its usual practice, provided that it has not elicited any particular objections. In practice, this is of little concern save to international organizations that are depositaries; the Commission nevertheless considered that it was inadvisable to rule out such a possibility *a priori* when the depositary was a State.

(11) The wording of guideline 2.3.1, which tries not to call into question the practice actually followed while at the same time guiding it, is based on the provisions of article 20, paragraph 5, of the 1986 Vienna Convention,[720] but adapts them to the specific case of the late formulation of reservations.

(12) The Commission also debated the particular procedures to be followed for objecting to the late formulation of a reservation to the constituent instrument of an international organization. According to article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions:

> "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization."

Applying as it does to reservations formulated "in time", this rule applies *a fortiori* when the formulation is late. This appears to be so obvious that it was not deemed useful to state it formally in a guideline.

2.3.2 Time period for formulating an objection to a reservation that is formulated late

An objection to a reservation that is formulated late must be made within twelve months of the acceptance, in accordance with guideline 2.3.1, of the late formulation of the reservation.

Commentary

(1) If the late formulation of the reservation has been unanimously accepted, in accordance with guidelines 2.3 and 2.3.1, the reservation must be considered and treated as such, and the rules concerning reservations are thus applicable to it. However, it seemed necessary to specify the content of those rules where the lateness of the formulation of the reservation calls for adaptations. This is the case for the period of time within which contracting States and organizations may formulate objections. What is at issue here is the objection to the reservation itself (and not "opposition" to its late formulation): if, and only if, the late formulation is unanimously accepted by all the contracting States and organizations, then they ought to be able to formulate objections to it as they would to any other reservation, unless the treaty otherwise provides.[721] This is the purpose of guideline 2.3.2.

(2) The guideline establishes that the objection produces its full effects when lodged within the twelve-month period following the unanimous acceptance of the late reservation. As this period is the one ordinarily provided to contracting States and organizations for the formulation of objections, it seems legitimate to provide it for objections to late reservations

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[719] See paragraph (5) of the commentary to the present guideline.

[720] "... unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation ..."; see guideline 2.8.2.

[721] See also paragraphs (23) and (24) of the commentary to guideline 2.3.

as well. However, the period begins not with the notification of the reservation but as of the time the late formulation of the reservation is unanimously accepted, since, under guideline 2.3.1, only in that case can it be considered to have been established.[722] Strict adherence to this time limit is an additional safeguard against any laxity.

(3) The Commission has not explicitly referred to the special situation of States and international organizations that, upon the expiration of the twelve-month period provided for in guideline 2.3.2, have not expressed their agreement to be bound by the treaty in question. While such States and international organizations can no longer challenge the unanimous acceptance of the late formulation of the reservation, nothing prevents them from objecting to the content of the reservation when they express their agreement to be bound by the treaty. The general rule provided for in article 20, paragraph 5, of the Vienna Conventions and echoed in guideline 2.6.12 applies in this situation. The result, with regard to reservations that are formulated late, is that a State or international organization can object to them until "the date on which such State or international organization expresses its consent to be bound by the treaty", if this consent is expressed after the end of the twelve-month period specified in guideline 2.3.2.

2.3.3 Limits to the possibility of excluding or modifying the legal effect of a treaty by means other than reservations

A contracting State or a contracting organization cannot exclude or modify the legal effect of provisions of the treaty by:

(a) the interpretation of an earlier reservation; or

(b) a unilateral statement made subsequently under a clause providing for options.

Commentary

(1) To make the exclusion in principle of the late formulation of reservations even stricter, the Commission considered it useful to adopt guideline 2.3.3, the purpose of which is to indicate that a party to a treaty may not get round this prohibition by means that have the same purpose as reservations but do not meet the definition of reservations. Otherwise, the *chapeau* of article 19 of the 1969 and 1986 Vienna Conventions[723] would be deprived of any specific scope.

(2) To this end, guideline 2.3.3 aims at two means in particular: the (extensive) interpretation of reservations made earlier, on the one hand, and statements made under an option clause appearing in a treaty, on the other. The selection of these two means of "circumvention" may be explained by the fact that they have both been used in practice and that this use has given rise to jurisprudence that is accepted as authoritative. One cannot, however, rule out the possibility that States or international organizations might have recourse in the future to other means of getting round the principle set out in guideline 2.3; it goes

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[722] For a discussion of the concept of established reservations, see section 4.1 of the Guide to Practice.

[723] The text of the *chapeau* of article 19 reads as follows: "A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: …". The Commission did not consider it necessary formally to reproduce in the Guide to Practice the rule enunciated in this provision, as doing so would overlap with the definition set out in guideline 1.1.

without saying that the reasoning which justifies the express prohibitions established in guideline 2.3.3 should therefore be applied *mutatis mutandis*.

(3) The principle that a reservation may not be formulated after the expression of consent to be bound appeared to be sufficiently established to the Inter-American Court of Human Rights for the Court to consider, in its advisory opinion of 8 September 1983 concerning *Restrictions to the death penalty*, that, once formulated, a reservation "escapes" from its author and may not be interpreted outside the context of the treaty itself. The Court adds the following:

> "A contrary approach might ultimately lead to the conclusion that the State is the sole arbiter of the extent of its international obligations on all matters to which its reservation relates, including even all such matters which the State might subsequently declare that it intended the reservation to cover.
>
> "The latter result cannot be squared with the Vienna Convention, which provides that a reservation can be made only when signing, ratifying, accepting, approving or acceding to a treaty (Vienna Convention, art. 19)."[724]

(4) Similarly, following the *Belilos* case,[725] the Swiss Government initially revised its 1974 "interpretative declaration", which the Strasbourg Court regarded as an invalid reservation, by adding a number of clarifications to its new "declaration".[726] The validity of this new declaration, which had been criticized in the relevant literature,[727] was challenged before the Swiss Federal Court, which, in its decision of 17 December 1992 in the *Elisabeth B. v. Council of State of Thurgau Canton* case, declared the declaration invalid on the ground that it was a new reservation[728] that was incompatible with article 57 (former article 64), paragraph 1, of the European Convention on Human Rights.[729] *Mutatis mutandis*, the limitation on the formulation of reservations imposed by this provision of the Rome Convention is similar to the limitation resulting from article 19 of the Vienna Conventions, and the judgement of the Swiss Federal Court should certainly be regarded as a reaffirmation of the prohibition of principle against reservations formulated after the expression of consent to be bound, but it goes further and establishes the impossibility of formulating a new reservation in the guise of an interpretation of an existing reservation.

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[724] Advisory opinion OC-3/83, paras. 63–64. On the interpretation of this advisory opinion see G. Gaja, footnote 28 above, p. 310.

[725] European Court of Human Rights, judgement of 29 April 1988, Series A, No. 132.

[726] See *ETS*, No. 5 (http://conventions.coe.int).

[727] See, in particular, G. Cohen-Jonathan, "Les réserves à la Convention européenne des droits de l'homme", *R.G.D.I.P.* 1989, p. 314. Also see the other references made by J.-F. Flauss, footnote 673 above, note 28, p. 300.

[728] The European Court of Human Rights would have declared the 1974 "declaration" as a whole invalid: "the interpretative declaration concerning article 6, paragraph 1, European Court of Human Rights, formulated by the Federal Council at the time of ratification could therefore not have a full effect in either the field of criminal law or in that of civil law. As a result, the 1988 interpretative declaration cannot be regarded as a restriction, a new formulation or a clarification of the reservation that existed previously. Rather, it represents a reservation formulated subsequently" (*Journal des Tribunaux*, 1995, p. 536; German text in *EuGRZ* 1993, p. 72).

[729] "Any State may, when signing this Convention or when depositing an instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article."

(5) The decision of the European Commission of Human Rights in the *Chrysostomos et al.* case leads to the same conclusion, but provides an additional lesson. In that case, the Commission believed that it followed from the "clear wording" of article 57 (former article 64), paragraph 1, of the European Convention on Human Rights "that a High Contracting Party may not, in subsequent recognition of the individual right of appeal, make a major change in its obligations arising from the Convention for the purposes of procedures under article 25".[730] Here again, the decision of the European Commission may be interpreted as a confirmation of the rule resulting from the introductory wording of the provision in question, with the important clarification that a State may not circumvent the prohibition on reservations after ratification by adding to a declaration made under an opting-in clause (which does not in itself constitute a reservation)[731] conditions or limitations with effects identical to those of a reservation, at least in cases where the option clause in question does not make any corresponding provision.

(6) The decisions of the Inter-American Court of Human Rights, the European Commission of Human Rights and the Swiss Federal Court reaffirm the stringency of the rule set out at the beginning of article 19 of the Vienna Conventions on the Law of Treaties and in guideline 2.3 and draw very direct and specific consequences therefrom, as is made explicit in guideline 2.3.3.

(7) Subparagraph (b) of this guideline refers implicitly to guideline 1.5.3 relating to unilateral statements made under an option clause, which the Commission has clearly excluded from the scope of the Guide to Practice. However, the purpose of guideline 2.3.3 is not to regulate these procedures as such but to act as a reminder that they cannot be used to circumvent the rules relating to reservations themselves.

2.3.4 Widening of the scope of a reservation

The modification of an existing reservation for the purpose of widening its scope is subject to the rules applicable to the late formulation of a reservation. If such a modification is opposed, the initial reservation remains unchanged.

Commentary

(1) The question of the modification of reservations should be posed in connection with the questions of the withdrawal and late formulation of reservations. Insofar as a modification is intended to lessen the scope of a reservation, what is involved is a partial withdrawal of the initial reservation, which poses no problem in principle, being subject to the general rules concerning withdrawal; the provisions of guidelines 2.5.10 and 2.5.11 apply. If, however, the effect of the modification is to widen the scope of an existing reservation, it would seem logical to start from the notion that what is involved is the late formulation of a reservation and to apply to it the rules that are applicable in this regard, which are stated in guidelines 2.3, 2.3.1 and 2.3.2.

(2) This is the reasoning underlying guideline 2.3.4, which refers to the rules on the late formulation of reservations and also makes it clear that, if a State has expressed its opposition to the widening of the reservation, the initial reservation applies.

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[730] Decision of 4 March 1991, *Revue Universelle des Droits de l'Homme*, 1991, p. 200, para. 15.

[731] See guideline 1.5.3 and the commentary thereto.

(3) Nevertheless, in the Council of Europe the prohibition against changes that widen the scope of reservations seems to be established. Within the Council framework, "[t]here have been instances where States have approached the Secretariat requesting information as to whether and how existing reservations could be modified. In its replies the Secretariat has always stressed that modifications which would result in an extension of the scope of existing reservations are not acceptable. Here the same reasoning applies as in the case of belated reservations … Allowing such modifications would create a dangerous precedent which would jeopardize legal certainty and impair the uniform implementation of European treaties".[732]

(4) The same author questions whether a State may denounce a treaty to which it has made reservations in order to ratify it again with widened reservations. He feels that such a procedure may constitute an abuse of rights, while admittedly basing his arguments on grounds specific to the Council of Europe conventions.[733]

(5) The Commission nevertheless considered that a regional practice (which, moreover, is not always consistent)[734] should not be transposed to the universal level, and that, as where widening of the scope of existing reservations is concerned, it would not be logical to apply rules that differ from those applicable to the late formulation of reservations.

(6) If, after expressing its consent, together with a reservation, a State or an international organization wishes to widen the reservation, such provisions will be fully applicable, for the same reasons:

- It is essential not to encourage the late formulation of limitations on the application of the treaty;
- On the other hand, there may be legitimate reasons why a State or an international organization might wish to modify an earlier reservation and, in some cases, it may be possible for the author of the reservation to denounce the treaty in order to ratify it again with a widened reservation;
- It is always possible for the parties to a treaty to modify it at any time by unanimous agreement;[735] it follows that they may also, by unanimous agreement, authorize a party to modify, again at any time, the legal effect of certain provisions of the treaty or

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[732] J. Polakiewicz, footnote 638 above, p. 96. This is comparable to the position taken by the European Commission of Human Rights in the case of *Chrysostomos et al. v. Turkey* (decision of 4 March 1991, applications Nos. 15299/89, 15300/89 and 15318/89, *R.U.D.H.* 1991, p. 193).

[733] *Ibid.* One can interpret in this sense the Swiss Federal Court decision of 17 December 1992 in the case of *Elisabeth B. v. Council of State of Thurgau Canton* (*Journal des Tribunaux*, vol. I: *Droit Fédéral*, 1995, pp. 523–537). On the same point, see J.-F. Flauss, footnote 673 above, p. 303. In this regard, it may be noted that on 26 May 1998 Trinidad and Tobago denounced the Optional Protocol to the International Covenant on Civil and Political Rights, and ratified it again the same day with a new reservation (*Multilateral Treaties …*, chap. IV.5). After several objections and a decision by the Human Rights Committee dated 2 November 1999 (Communication No. 845/1999, *Rawle Kennedy v. Trinidad and Tobago* (CCPR/C/67/D/845/1999), Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-fifth session, Supplement No. 40* (A/55/40, vol. II, annex XI.A), Trinidad and Tobago again denounced the Protocol on 27 March 2000 (*ibid.*). What was involved, however, was not the modification of an existing reservation, but the formulation of an entirely new reservation.

[734] See paragraph (15) of the commentary to guideline 2.3, footnote 698.

[735] Cf. article 39 of the 1969 and 1986 Vienna Conventions.

of the treaty as a whole with respect to certain specific aspects in their application to that party; and

- The requirement of the *unanimous* consent of the other parties to the widening of the scope of the reservation seems to constitute an adequate safeguard against abuse.

(7) At least at the universal level, moreover, the justified reluctance not to encourage States parties to a treaty to widen the scope of their reservations after expressing their consent to be bound has not prevented an alignment of practice in respect of the widening of the scope of reservations with practice relating to the late formulation of reservations,[736] and this is entirely a matter of common sense.

(8) Depositaries treat widening of the scope of a reservation in the same way as the late formulation of a reservation. When they receive such a request by one of the contracting States or organizations, they consult all the other contracting States or organizations and accept the new wording of the reservation only if none of the parties opposes it by the deadline for replies.

(9) For example, when Finland acceded on 1 April 1985 to the 1993 Protocol on Road Markings, additional to the European Agreement supplementing the Convention on Road Signs and Signals of 1968, it formulated a reservation to a technical provision of the instrument.[737] Ten years later, on 5 September 1995, Finland declared that its reservation also applied to a situation other than the one originally mentioned:[738]

> "In keeping with the practice followed in similar cases, the Secretary-General proposed to receive the modification in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged. None of the Contracting Parties to the Protocol having notified the Secretary-General of an objection within a period of 90 days from the date of its circulation (on 20 December 1995), the said modification was accepted for deposit upon the expiration of the above-stipulated 90-day period, that is, on 19 March 1996."[739]

The procedure followed by the Secretary-General is the same as the one currently followed in the case of late formulation of reservations.[740] [741]

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[736] Gaja gives the example of the "correction" by France on 11 August 1982 of the reservation formulated in its instrument of approval of the 1978 Protocol to the International Convention of 1973 for the Prevention of Pollution from Ships (MARPOL), which it deposited with the Secretary-General of the Intergovernmental Maritime Consultative Organization (IMCO) on 25 September 1981 (G. Gaja, footnote 28 above, pp. 311–312). This is a somewhat unusual case, since, at the time of the "correction", the MARPOL Protocol had not yet entered into force with respect to France; in this instance, the depositary does not appear to have made acceptance of the new wording dependent on the unanimous agreement of the other parties, some of which did in fact object to the substance of the modified reservation (see *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Functions as at 31 May 2011*, p. 118).

[737] In its original reservation with respect to paragraph 6 of the annex, Finland reserved "the right to use yellow colour for the continuous line between the opposite directions of traffic" (*Multilateral Treaties ...*, chap. XI.B.25).

[738] "... the reservation made by Finland also applies to the barrier line" (*ibid.*).

[739] *Ibid.*

[740] See the commentary to guideline 2.3 ("Late formulation of reservations"), paras. (12) and (14).

[741] It should be noted that, at present, the period would be twelve months, not 90 days (see guideline 2.3.1 ("Acceptance of late formulation of reservations") and, in particular, paras. (4) to (9) of the commentary.

(10) As another example, the Government of the Republic of the Maldives notified the Secretary-General on 29 January 1999 that it wished to modify the reservations it had formulated upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women in 1993. Germany, which had objected to the original reservations, also opposed their modification, arguing, among other things, that:

> "... reservations to treaties can only be made by a State when signing, ratifying, accepting, approving or acceding to a treaty (article 19 of the Vienna Convention on the Law of Treaties). After a State has bound itself to a treaty under international law it can no longer submit new reservations or extend or add to old reservations. It is only possible to totally or partially withdraw original reservations, something unfortunately not done by the Government of the Republic of the Maldives with its modification."[742]

(11) Guideline 2.3.4 refers implicitly to guidelines 2.3, 2.3.1 and 2.3.2 on the late formulation of reservations. It did not seem necessary to say so expressly in the text because these guidelines immediately precede it in the Guide to Practice.

(12) It should, however, be noted that the transposition of the rules applicable to the late formulation of reservations, as contained in guideline 2.3.2, to the widening of the scope of an existing reservation cannot be unconditional. In both cases, the existing situation remains the same in the event of an opposition by any of the contracting States or organizations; however, this situation is different: prior to the late formulation of a reservation the treaty applied in its entirety as between the contracting States and organizations so long as no other reservations were made. In the case of the widening of the scope of a reservation, however, the reservation had already been made and produced the effects recognized by the Vienna Conventions. This is the difference of situation that is covered by the second sentence of guideline 2.3.4, which provides that, in this second case, the initial reservation remains unchanged in the event of an opposition to the widening of its scope.

(13) The Commission did not consider it necessary for a guideline to define the term "widening of the scope of a reservation" because its meaning is so obvious. Bearing in mind the definition of a reservation contained in guideline 1.1, it is clear that this term applies to any modification designed to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole in respect of certain specific aspects in their application to the reserving State or international organization, in a broader manner than the initial reservation.

2.4 Procedure for interpretative declarations

Commentary

In the absence of any provision on interpretative declarations in the Vienna Conventions and relative uncertainty of practice with regard to such declarations, they cannot be considered in isolation. One can only proceed by analogy with (or in contrast to) reservations, with the understanding that conditional interpretative declarations are subject to the same rules as reservations.[743]

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[742] *Multilateral Treaties* ..., chap. IV.8. Finland also objected to the modified Maldivian reservation (*ibid.*). The German and Finnish objections were made more than 90 days after the notification of the modification, the deadline set at that time by the Secretary-General.

[743] On the distinction, see guidelines 1.2 and 1.4 and the commentary thereto.

2.4.1 Form of interpretative declarations

An interpretative declaration should preferably be formulated in writing.

Commentary

(1) There would be no justification for requiring a State or an international organization to follow a given procedure for giving, in a particular form, its interpretation of a convention to which it is a party or a signatory or to which it intends to become a party. Consequently, the formal validity of an interpretative declaration is not linked to observance of a specific form or procedure.[744] The rules governing the form and communication of reservations cannot then be purely and simply transposed to simple interpretative declarations, which may be formulated orally, and it would thus be paradoxical to insist that they be formally communicated to the other States or international organizations concerned.

(2) Nevertheless, while there is no legal obligation in that regard, it seems appropriate to ensure, to the extent possible, that interpretative declarations are publicized widely. If no such communication exercise is undertaken, the author of the declaration runs the risk that the declaration will not have the desired effect. Indeed, the influence of a declaration in practice depends to a great extent on its dissemination.

(3) Without discussing the legal implications of these declarations for the interpretation and application of the treaty in question,[745] it goes without saying that such unilateral statements are likely to play a role in the life of the treaty; this is their *raison d'être* and the purpose for which they are formulated by States and international organizations. The International Court of Justice has highlighted the importance of these statements in practice:

> "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument."[746]

Rosario Sapienza has also underlined the importance and the role of interpretative declarations and of reactions to them, as they:

> "... *forniranno utile contributo anche alla soluzione* [of a dispute]. *E ancor più le dichiarazioni aiuteranno l'interprete quando controversia non si dia, ma semplice problema interpretativo.*"[747]
>
> ["... will contribute usefully to the settlement [of a dispute]. Statements will be still more useful to the interpreter when there is no dispute, but only a problem of interpretation."]

In her study *Einseitige Interpretationserklärungen zu multilateralen Verträgen* ("Unilateral Interpretative Declarations to Multilateral Treaties"), Monika Heymann has rightly stressed:

> "*Dabei ist allerdings zu beachten, dass einer schriftlich fixierten einfachen Interpretationserklärung eine größere Bedeutung dadurch zukommen kann, dass die*

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[744] See also M. Heymann, footnote 147 above, p. 117.

[745] See Part 4, section 7, of the Guide to Practice.

[746] Advisory opinion of 11 July 1950, *International status of South-West Africa, I.C.J. Reports 1950*, pp. 135–136. For what is clearly a narrower view of the possible influence of interpretative declarations, however, see *I.C.J. Judgment*, 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *I.C.J. Reports 2009*, p. 78, para. 42.

[747] R. Sapienza, footnote 129 above, p. 275.

> *übrigen Vertragsparteien sie eher zur Kenntnis nehmen und ihr im Streitfall eine höhere Beweisfunktion zukommt.*"[748]
>
> ["In this regard, it should be noted that a simple written interpretative declaration can take on greater importance because the other contracting parties take note of it and, in the event of a dispute, it has greater probative value."]

(4) Moreover, in practice, States and international organizations endeavour to give their interpretative declarations the desired publicity. They transmit them to the depositary, and the Secretary-General of the United Nations in turn disseminates the text of such declarations[749] and publishes them online in *Multilateral Treaties Deposited with the Secretary-General.*[750] Clearly, this communication procedure, which ensures wide publicity, requires that declarations be made in writing.

(5) This requirement, however, is merely a practicality born of the need for efficacy. As the Commission has pointed out above,[751] there is no legal obligation in this regard. This is why, unlike guideline 2.1.1 on the written form of reservations, guideline 2.4.1 takes the form of a simple recommendation, like the guidelines concerning, for example, the statement of reasons for reservations[752] and objections to reservations.[753] The use of the auxiliary "should" and the inclusion of the word "preferably" reflect the desirable but voluntary nature of use of the written form.

2.4.2 Representation for the purpose of formulating interpretative declarations

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

Commentary

(1) Guideline 2.4.2 transposes and adapts to interpretative declarations, as defined by guideline 1.2, the provisions of guideline 2.1.3 on representation for the purpose of formulating a reservation at the international level.

(2) It goes without saying that such declarations can only produce effects, whatever their nature, if they emanate from an authority competent to engage the State or the international organization at the international level. And since the declaration purports to produce effects in relation to a treaty, it would seem appropriate to limit the option of formulating it to the authorities competent to engage the State or the organization through a treaty.

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[748] M. Heymann, see footnote 147 above, p. 118.

[749] United Nations, *Summary of Practice* ..., footnote 75 above, para. 218.

[750] Cite but one example, while article 319 of the United Nations Convention on the Law of the Sea does not explicitly require its depositary to communicate interpretative declarations made under article 311 of the Convention, the Secretary-General publishes them systematically in chapter XXI.6 of *Multilateral Treaties* ... (available from http://treaties.un.org).

[751] Para. (1) of the present commentary.

[752] Guideline 2.1.2 (Statement of reasons for reservations).

[753] Guideline 2.6.9 (Statement of reasons for objections).

2.4.3 Absence of consequences at the international level of the violation of internal rules regarding the formulation of interpretative declarations

1. The competent authority and the procedure to be followed at the internal level for formulating an interpretative declaration are determined by the internal law of each State or the relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations for the purpose of invalidating the declaration.

Commentary

(1) The formulation of interpretative declarations at the internal level calls for the same comments as in the case of reservations. In this regard, national rules and practices are extremely diverse. This becomes clear from the replies of States to the Commission's questionnaire on reservations to treaties. Of the 22 States that replied to questions 3.5 and 3.5.1,[754]

- In seven cases, only the executive branch is competent to formulate a declaration;[755]
- In one case, only the Parliament has such competence;[756] and
- In 14 cases, competence is shared between the two,[757] and the modalities for collaboration between them are as diverse as they are with regard to reservations.

In general, the executive branch probably plays a more distinct role than it does in the case of reservations.

(2) It follows *a fortiori* that competence to formulate interpretative declarations and the procedure to be followed in that regard are determined purely by internal law and that a State or an international organization would not be entitled to invoke a violation of internal law as invalidating the legal effect that its declarations might produce – especially since it appears that, in general, there is greater reliance on practice than on formal written rules.

(3) It is therefore appropriate to transpose to interpretative declarations the provisions of guideline 2.1.4 on the absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations.

2.4.4 Time at which an interpretative declaration may be formulated

Without prejudice to the provisions of guidelines 1.4 and 2.4.7, an interpretative declaration may be formulated at any time.

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[754] Question 3.5: "At the internal level, what authority or authorities take(s) the decision to make such interpretative declarations?"; question 3.5.1: "Is the Parliament involved in the formulation of these declarations?" This list of States is not identical to the list of States that responded to similar questions on reservations.

[755] Chile, the Holy See, India, Israel, Italy, Japan and Malaysia.

[756] Estonia.

[757] Argentina, Bolivia, Croatia, Finland, France, Germany, Mexico, Panama, Slovakia, Slovenia, Spain, Sweden, Switzerland and the United States of America.

Commentary

(1) It results from guideline 1.2, which defines interpretative declarations independently of any time element, that a "simple" interpretative declaration may, unlike a reservation (and a conditional interpretative declaration), be formulated at any time. It is therefore enough to refer to the Commission's commentary to that provision,[758] and guideline 2.4.4 follows specifically therefrom. This possibility is, however, not absolute and involves three exceptions.

(2) The first relates to the relatively frequent case of treaties providing expressly that interpretative declarations to them can be formulated only at a specified time or times, as in the case, for example, of article 310 of the United Nations Convention on the Law of the Sea.[759] It is clear that in a case of this kind the contracting States or contracting organizations may make interpretative declarations such as those referred to in the relevant provision only at the time or times restrictively indicated in the treaty.

(3) It seems superfluous to mention this exception, which is self-evident: the Guide to Practice is intended to be exclusively residual in nature, and it goes without saying that the provisions of a treaty must be applicable as a matter of priority if they are contrary to the guidelines contained in the Guide.[760] It seemed advisable, however, to provide for the very specific case of the late formulation of an interpretative declaration when a treaty provision expressly limits the possibility of formulating such a reservation *ratione temporis*. This case is covered by guideline 2.4.7, to which guideline 2.4.4 refers.

(4) The existence of an express treaty provision limiting the option of formulating interpretative declarations is not the only instance in which a State or an international organization is prevented *ratione temporis* from formulating an interpretative declaration.[761] The same applies in cases where the State or organization has already formulated an interpretation which its partners have taken as a basis or were entitled to take as a basis (estoppel). In such cases, the author of the initial declaration is prevented from modifying it.

(5) The third exception relates to conditional interpretative declarations, which, unlike simple interpretative declarations, cannot be formulated at any time, as is stated in guideline 1.4 on the definition of such instruments,[762] to which guideline 2.4.4 expressly refers.[763]

(6) Lastly, it is obvious that only an existing instrument can be interpreted and that it is therefore unnecessary to specify that a declaration can be made only after the text of the provision of the treaty concerned has been finally adopted.

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[758] See paragraphs (21) to (31) of the commentary to guideline 1.2.

[759] "Article 309 [excluding reservations] does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and its regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of this Convention in their application to that State." See also, for example, article 26, paragraph 2, of the Basel Convention of 22 March 1989 on the Control of Transboundary Movements of Hazardous Wastes and article 43 of the New York Agreement of 4 August 1995 on Straddling Fish Stocks.

[760] The Commission nevertheless departed from this principle in a few cases when it decided to place the emphasis on the residual nature of the guidelines it was proposing (see, for example, guideline 2.3 and paragraph (7) of the commentary thereto, above; see also guidelines 2.3.1 and 2.4.8).

[761] See guideline 2.4.8 and paragraph (5) of the commentary thereto.

[762] See paragraph (14) of the commentary to guideline 1.4.

[763] See also guidelines 1.1 and 2.3.

2.4.5 Communication of interpretative declarations

The communication of written interpretative declarations should follow the procedure established in guidelines 2.1.5, 2.1.6 and 2.1.7.

Commentary

(1) The considerations that led the Commission to adopt guideline 2.4.1, recommending that States and international organizations should preferably formulate their interpretative declarations in writing,[764] apply equally to the dissemination of such declarations, which need to be in written form to be publicized.

(2) Here, too, it is in the interests of both the author of the interpretative declaration and the other contracting States or contracting organizations that the declaration should be disseminated as widely as possible. If the authors of interpretative declarations wish their position to be taken into account in the application of the treaty — particularly if there is any dispute — it is undoubtedly in their interest to have their position communicated to the other States and international organizations concerned. Moreover, only a procedure of this type seems to give the other contracting States or contracting organizations an opportunity to react to an interpretative declaration.

(3) This communication procedure could draw upon the procedure applicable to other types of declaration in respect of a treaty, such as the procedure for the communication of reservations, as set out in guidelines 2.1.5 to 2.1.7, it being understood that this is only a recommendation, since, unlike reservations, interpretative declarations are not required to be made in writing.[765]

2.4.6 Non-requirement of confirmation of interpretative declarations formulated when signing a treaty

An interpretative declaration formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

Commentary

(1) The rule that it is not necessary to confirm interpretative declarations made when signing a treaty in fact derives inevitably from the principle embodied in guideline 2.4.4. Since interpretative declarations may be made at any time, save in exceptional cases, it would be illogical and paradoxical to require that they should be confirmed when a State or an international organization expressed its consent to be bound by the treaty.

(2) In this connection, there is a marked contrast between the rules applicable to reservations[766] and those relating to interpretative declarations, since the principle is the exact opposite: reservations formulated when signing a treaty must in principle be confirmed, while interpretative declarations need not.

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[764] See the commentary to guideline 2.4.1.

[765] See guideline 2.4.1 and commentary thereto.

[766] See guideline 2.2.1 and commentary thereto.

(3) In the light of the very broad wording of guideline 2.4.6, the transposition to interpretative declarations of the principle established in guideline 2.2.2,[767] according to which it is not necessary to confirm a reservation formulated when signing a treaty not subject to ratification (agreement in simplified form), would be pointless: the principle stated in guideline 2.4.6 is applicable to all categories of treaties, whether they enter into force solely as a result of their signature or are subject to ratification, approval, acceptance, formal confirmation or accession.

(4) In practice, the opposition between the rules applicable to reservations, on the one hand, and to interpretative declarations, on the other, is in fact not as clear-cut as it may seem, since nothing prevents a State or an international organization that has made a declaration when signing from confirming it when expressing its final consent to be bound.

2.4.7 Late formulation of an interpretative declaration

Where a treaty provides that an interpretative declaration may be formulated only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently, unless none of the other contracting States and contracting organizations objects to the late formulation of the interpretative declaration.

Commentary

(1) Guideline 2.4.7 is the counterpart, for interpretative declarations, of guideline 2.3, relating to reservations.

(2) Despite the principle enunciated in guideline 2.4.4, whereby interpretative declarations may be made at any time after the adoption of the text of the provision of the treaty concerned, interpretative declarations, like reservations, may be formulated late. This is obviously true for conditional interpretations, which, like reservations themselves, can be formulated (or confirmed) only at the time of expression of consent to be bound, as specified in guidelines 1.1 and 1.4. But this may also be the case with simple interpretative declarations, particularly when the treaty itself establishes the period within which they may be formulated.[768] The object of guideline 2.4.7 is to cover this situation, which is expressly allowed for in guideline 2.4.4.

(3) This is not an academic question. For example, the Egyptian Government had in 1993 ratified the Basel Convention of 22 March 1989 on the Control of Transboundary Movements of Hazardous Wastes and their Disposal without attaching any particular declarations to its instrument of ratification, but on 31 January 1995 it formulated declarations interpreting certain provisions of the treaty,[769] which limited such a possibility solely to the time of expression by a party of its consent to be bound.[770] Since certain Parties to the Convention contested the admissibility of the Egyptian declarations, either because, in their view, the declarations were really reservations (prohibited by article 26, paragraph 1) or because they were formulated late,[771] the Secretary-General of the United Nations, the depositary of the

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[767] See the commentary to the present guideline.

[768] See paragraphs (2) and (3) of the commentary to guideline 2.4.4.

[769] See *Multilateral Treaties* ..., chap. XXVII.3.

[770] Under article 26, paragraph 2, of the Convention, a State may, within certain limits, formulate such declarations, but only "when signing, ratifying, accepting, approving or formally confirming or acceding to this Convention".

[771] See the observations by the United Kingdom, Finland, Italy, the Netherlands or Sweden (*Multilateral Treaties* ..., chap. XXVII.3).

Basel Convention, "in keeping with the depositary practice followed in similar cases, ... proposed to receive the declarations in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of their circulation".[772] Subsequently, in view of the objections received from certain contracting States, he "[took] the view that he [was] not in a position to accept these declarations [formulated by Egypt] for deposit",[773] declined to include them in the section entitled "Declarations and Reservations" and reproduced them only in the section entitled "Notes", accompanied by the objections concerning them.

(4) It will be inferred from this example, which was not protested by any of the contracting States to the Basel Convention that, in the particular but not exceptional case in which a treaty specifies the times at which interpretative declarations may be made, the same rules should be followed as those set out in guideline 2.3. The commentary to that provision is therefore transposable, *mutatis mutandis*, to guideline 2.4.7.

(5) It is self-evident that the approaches laid down in guidelines 2.3.1 and 2.3.2[774] can also be transposed to acceptances of interpretative declarations formulated late and oppositions to such formulation. Nevertheless, the Commission considered that it was not useful to overburden the Guide to Practice by including specific guidelines in this respect.

2.4.8 Modification of an interpretative declaration

Unless the treaty otherwise provides, an interpretative declaration may be modified at any time.

Commentary

(1) According to the definition given in guideline 1.2, simple interpretative declarations are clarifications of the meaning or scope of the provisions of the treaty. They may be made at any time[775] (unless the treaty otherwise provides)[776] and are not subject to the requirement of confirmation.[777] There is thus nothing to prevent them from being modified at any time in the absence of a treaty provision stating that the interpretation must be given at a specified time, as indicated in guideline 2.4.8, the text of which is a combination of the texts of guidelines 2.4.4 ("Time at which an interpretative declaration may be formulated") and 2.4.7 ("Late formulation of an interpretative declaration").

(2) It follows that a simple interpretative declaration may be modified at any time, subject to provisions to the contrary contained in the treaty itself, which may limit the possibility of making such declarations in time, or in a case which is highly unlikely but which cannot be ruled out in principle, where the treaty expressly limits the possibility of modifying interpretative declarations.

(3) There are few clear examples illustrating this guideline. Mention may be made, however, of the modification by Mexico, in 1987, of its declaration concerning article 16 of

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[772] *Ibid.*

[773] *Ibid.*

[774] See above.

[775] Cf. guideline 2.4.4.

[776] Cf. guideline 2.4.7.

[777] Cf. guideline 2.4.6.

the International Convention against the Taking of Hostages of 17 December 1979, made upon accession in 1987.[778]

(4) For all that, and despite the paucity of convincing examples, guideline 2.4.8 seems to flow logically from the very definition of interpretative declarations.

(5) It is obvious that, if a treaty provides that an interpretative declaration can be made only at specified times, it follows that such a declaration cannot be modified at other times. In the case where the treaty limits the possibility of making or modifying an interpretative declaration in time, the rules applicable to the late formulation of such a declaration, as stated in guideline 2.4.7, should be applicable *mutatis mutandis* if, notwithstanding that limitation, a State or an international organization intended to modify an earlier interpretative declaration: such a modification would be possible only in the absence of an objection by any of the other contracting States or contracting organizations.

2.5 Withdrawal and modification of reservations and interpretative declarations

2.5.1 Withdrawal of reservations

Unless the treaty otherwise provides, a reservation may be withdrawn at any time without the consent of a State or of an international organization which has accepted the reservation being required for its withdrawal.

Commentary

(1) Guideline 2.5.1 reproduces the text of article 22, paragraph 1, of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which is itself based on that of article 22, paragraph 1, of the 1969 Vienna Convention, with the addition of international organizations. These provisions were hardly discussed during the *travaux préparatoires*.[779]

(2) The question of the withdrawal of reservations did not attract the attention of Special Rapporteurs on the law of treaties until fairly late, and even then only to a limited degree. J.L. Brierly and Sir Hersch Lauterpacht were preoccupied with the admissibility of reservations and did not devote any draft article to the question of the criterion for the withdrawal of reservations.[780] It was not until 1956 that, in his first report, Sir Gerald Fitzmaurice proposed the following wording for draft article 40, paragraph 3:

> A reservation, though admitted, may be withdrawn by formal notice at any time. If this occurs, the previously reserving State becomes automatically bound to comply

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[778] See *Multilateral Treaties* ..., chap. XVIII.5.

[779] See also Alain Pellet, Commentaire de l'article 22 (1969), in O. Corten and P. Klein (eds.), *Les Conventions de Vienne sur le droit des traités* ..., footnote 30 above, vol. I, p. 942, para. 17 and 1969 Vienna Convention Article 22, in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties* ..., footnote 30 above, vol. I, p. 573, para. 17.

[780] The furthest Lauterpacht went was to draw attention to some proposals made in April 1954 to the Commission on Human Rights on the subject of reservations to the "Covenant of Human Rights", expressly providing for the possibility of withdrawing a reservation simply by notifying the Secretary-General of the United Nations (second report on the law of treaties, A/CN.4/87, para. 7; *Yearbook ... 1954*, vol. II, pp. 131–132).

fully with the provision of the treaty to which the reservation related and is equally entitled to claim compliance with the provision by the other parties.[781]

(3) The draft was not discussed by the Commission, but, in his first report, Sir Humphrey Waldock returned to the concept in a draft article 17, entitled "Power to formulate and withdraw reservations",[782] which posited the principle of the "absolute right of a State to withdraw a reservation unilaterally, even when the reservation has been accepted by other States".[783]

> A State which has formulated a reservation is free to withdraw it unilaterally, either in whole or in part, at any time, whether the reservation has been accepted or rejected by the other States concerned. Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty.[784]

This proposal was not discussed in plenary, but the Drafting Committee, while retaining the spirit of the provision, made extensive changes not only to the wording, but even to the substance: the new draft article 19, which dealt exclusively with "The withdrawal of reservations", no longer mentioned the notification procedure, but included a paragraph 2 relating to the effect of the withdrawal.[785] This draft was adopted with the addition of a provision in the first paragraph specifying when the withdrawal took legal effect.[786] According to draft article 22 on first reading:

> "1. A reservation may be withdrawn at any time and the consent of the State which has accepted the reservation is not required for its withdrawal. Such withdrawal takes effect when notice of it has been received by the other States concerned.
>
> 2. Upon withdrawal of the reservation, the provisions of article 21 cease to apply."[787]

(4) Only three States reacted to draft article 22,[788] which was consequently revised by the Special Rapporteur. He proposed that:[789]

- The provision should take the form of a residual rule;

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[781] *Yearbook … 1956*, vol. II, p. 116. In his commentary on this provision, Sir Gerald Fitzmaurice restricted himself to saying that it did not require any explanation (*ibid.*, p. 131, para. 101).

[782] *Yearbook … 1962*, vol. II, p. 61.

[783] *Ibid.*, p. 75, document A/CN.4/144, para. (12) of the commentary to article 17.

[784] Paragraph 6 of draft article 17, *ibid.*, p. 61.

[785] At the request of Bartoš (*Yearbook … 1962*, vol. I, 664th meeting, 19 June 1962, p. 234, para. 67).

[786] *Ibid.*, paras. 69–71 and 667th meeting, 25 June 1962, p. 253, paras. 73–75.

[787] *Yearbook … 1962*, vol. II, p. 181, document A/5209; article 21 related to "The application of reservations".

[788] Fourth report of Sir Humphrey Waldock on the law of treaties, *Yearbook … 1965*, vol. II, p. 55, document A/CN.4/177 and Add.1 and 2. Israel considered that notification should be through the channel of the depositary, while the United States of America welcomed the "provision that the withdrawal of the reservation 'takes effect when notice of it has been received by the other States concerned'"; the comment by the United Kingdom related to the effective date of the withdrawal; see paragraph (4) of the commentary to guideline 2.5.8. For the text of the comments by the three States, see *Yearbook … 1966*, vol. II, pp. 351 (United States), 295 (Israel, para. 14) and 344 (United Kingdom).

[789] For the text of the draft article proposed by Waldock, see *ibid.*, p. 56, or *Yearbook … 1965*, vol. I, 800th meeting, 11 June 1965, p. 174, para. 43.

- It should be specified that notification of a withdrawal should be made by the depositary, if there was one; and
- A period of grace should be allowed before the withdrawal became operative.[790]

(5) During the consideration of these proposals, two members of the Commission maintained that, where a reservation formulated by a State was accepted by another State, an agreement existed between those two States.[791] This proposition received little support and the majority favoured the notion, expressed by Bartoš, that "normally, a treaty was concluded in order to be applied in full; reservations constituted an exception which was merely tolerated".[792] Following this discussion, the Drafting Committee effectively reverted, in a different formulation, to the two concepts in paragraph 1 of the 1962 text.[793] The new text was the one eventually adopted,[794] and it became the final version of draft article 20 ("Withdrawal of reservations"):

> "1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.
>
> 2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative only when notice of it has been received by the other contracting States."[795]

(6) The commentary to the provision was, apart from a few clarifications, a repetition of that of 1962.[796] The Commission expressed the view that the parties to the treaty "ought to be presumed to wish a reserving State to abandon its reservation, unless a restriction on the withdrawal of reservations has been inserted in the treaty".[797]

(7) At the Vienna Conference, the text of this draft article (which had by now become article 22 of the Convention) was incorporated unchanged, although several amendments of detail had been proposed.[798] However, on the proposal of Hungary, two important additions were adopted:

- First, it was decided to bring the procedure relating to the withdrawal of objections to reservations into line with that relating to the withdrawal of reservations themselves;[799] and,

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[790] On this point, see paragraph (4) of the commentary to guideline 2.5.8. .

[791] See the comments by Verdross and (less clearly) Amado, 800th meeting, 11 June 1965, p. 175, para. 49, and p. 176, para. 60.

[792] *Ibid.*, p. 175, para. 50.

[793] See paragraph (3) above; for the first text adopted by the Drafting Committee in 1965, see *Yearbook ... 1965*, vol. I, 814th meeting, 29 June 1965, p. 272, para. 22.

[794] See *Yearbook ... 1965*, vol. I, 816th meeting, p. 284, paras. 56–60, and *Yearbook ... 1966*, vol. I, Part Two, p. 327, para. 106.

[795] *Yearbook ... 1966*, vol. II, p. 209, document A/6309/Rev.1; drafted along the same lines, the corresponding text was article 22 of the 1965 draft (*Yearbook ... 1965*, vol. II, p. 162, document A/6009).

[796] See paragraph (3) above.

[797] *Yearbook ... 1966*, vol. II, p. 209.

[798] See the list and the text of these amendments and sub-amendments in the report of the Committee of the Whole, *Documents of the Conference*, footnote 54 above, pp. 141–142, paras. 205–211.

[799] For the text of the Hungarian amendment, see A/CONF.39/L.18, which was reproduced in *Official Records ...*, footnote 798 above, p. 267; for the discussion of it, see the debates at the 11th plenary meeting of the Conference (30 April 1969) in *Second Session, Summary records*,

- Secondly, a paragraph 4 was added to article 23 specifying that the withdrawal of reservations (and of objections) should be made in writing.[800]

(8) Basing himself on the principle that "there is no reason to put international organizations in a situation different from that of States in the matter of reservations", Paul Reuter, in his fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations, restricted himself to submitting "draft articles which extend the rules embodied in articles 19 to 23 of the 1969 Convention to agreements to which international organizations are parties", subject only to "minor drafting changes".[801] So it proved with article 22, in which the Special Rapporteur restricted himself to adding a reference to international organizations, and article 23, paragraph 4, which he reproduced in its entirety.[802] These proposals were adopted by the Commission without amendment[803] and retained on second reading.[804] The 1986 Vienna Conference did not bring about any fundamental change.[805]

(9) It appears from the provisions thus adopted that the withdrawal of a reservation is a unilateral act. This puts an end to the once deeply debated theoretical question of the legal nature of withdrawal: is it a unilateral decision or a conventional act?[806] Article 22, paragraph 1, of the two Vienna Conventions rightly opts for the first of these positions. As the Commission stated in the commentary to the draft articles adopted on first reading:[807]

> "It has sometimes been contended that when a reservation has been accepted by another State it may not be withdrawn without the latter's consent, as the acceptance of the reservation establishes a regime between the two States which cannot be changed without the agreement of both. The Commission, however, considers that the preferable rule is that the reserving State should in all cases be authorized, if it is willing to do so, to bring its position into full conformity with the provisions of the treaty as adopted."[808]

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footnote 332 above, pp. 36–38, paras. 14–41.

[800] Regarding this amendment, see paragraph (2) of the commentary to guideline 2.5.2.

[801] *Yearbook ... 1975*, vol. II, pp. 36 and 37, document A/CN.4/285, para. (5) of the general commentary to section 2.

[802] *Ibid.*, p. 38, and fifth report, *Yearbook ... 1976*, vol. II, Part One, p. 146.

[803] See the Commission's discussions in 1977: 1434th meeting, 6 June 1977, *Yearbook ... 1977*, vol. I, pp. 100–101, paras. 30–34; 1435th meeting, 7 June 1977, *ibid.*, p. 103, paras. 1 and 2; 1451st meeting, 1 July 1977, *ibid.*, pp. 194–195, paras. 12–16; and the report of the Commission, *Yearbook ... 1977*, vol. II, Part Two, pp. 114–115.

[804] States and international organizations made no comment on these provisions. See the tenth report of Paul Reuter, *Yearbook ... 1981*, vol. II, Part One, pp. 63–64; the Commission's discussions: 1652nd meeting, 15 May 1981, *Yearbook ... 1981*, vol. I, p. 54, paras. 27–29; 1692nd meeting, 16 July 1981, *ibid.*, pp. 264–265, paras. 38–41; the report of the Commission, *Yearbook ... 1981*, vol. II, Part Two, p. 140; and the final report for 1982, *Yearbook ... 1982*, vol. II, Part Two, p. 37.

[805] See *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna*, 18 February–21 March 1986, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.94.V.5, vol. I), 5th plenary meeting, 18 March 1986, p. 14, paras. 62–63.

[806] On this disagreement on the theory, see particularly P.-H. Imbert, footnote 25 above, p. 288, or F. Horn, footnote 25 above, pp. 223–224, and the references cited. For a muted comment on this disagreement during the *travaux préparatoires* on article 22, see paragraph (5) above.

[807] See paragraph (3) above.

[808] *Yearbook ... 1962*, vol. II, pp. 181–182, document A/5209, para. (1) of the commentary to article 22.

(10) This is still the Commission's view. By definition, a reservation is a *unilateral*[809] act, even though States or international organizations may, by agreement, reach results comparable to those produced by reservations,[810] but the decision to opt for a reservation, by contrast, rightly implies a resort to unilateral action.

(11) It could perhaps be argued that, in accordance with article 20 of the Vienna Conventions, a reservation which is made by a State or an international organization and is not expressly provided for by the treaty is effective only for the parties that have accepted it, if only implicitly. On the one hand, however such acceptance does not alter the nature of the reservation — it gives effect to it, but the reservation is still a distinct unilateral act — and, on the other hand and above all, such an argument involves extremely formalistic reasoning that takes no account of the benefit of limiting the number and the scope of reservations in order to preserve the integrity of the treaty. As has been rightly observed,[811] the signatories to a multilateral treaty expect, in principle, that it will be accepted as a whole, and there is at least a presumption that, if a necessary evil, reservations are regretted by the other parties. It is worth pointing out, moreover, that the withdrawal of reservations, while sometimes regulated,[812] is never forbidden under a treaty.[813]

(12) Furthermore, the unilateral withdrawal of reservations has apparently never given rise to any particular difficulty, and none of the States or international organizations that replied to the Commission's questionnaire on reservations[814] has noted any problem in that regard. The recognition of such a right of withdrawal is also in accordance with the letter or the spirit of treaty clauses expressly relating to the withdrawal of reservations, which are either worded in terms similar to those in article 22, paragraph 1,[815] or aim to encourage withdrawal by urging States to withdraw them "as soon as circumstances permit".[816] In the same spirit, international organizations and human rights treaty monitoring bodies constantly issue recommendations urging States to withdraw reservations that they made when ratifying or acceding to treaties.[817]

(13) Such objectives also justify the fact that the withdrawal of a reservation may take place "at any time",[818] which could even mean before the entry into force of a treaty by a State that

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[809] Cf. article 2, paragraph 1 (d), of the Vienna Conventions and guideline 1.1.

[810] Cf. guideline 1.7.1 and commentary thereto.

[811] See paragraph (5) above.

[812] See the commentary to guidelines 2.5.7 and 2.5.8.

[813] Cf. Luigi Migliorino, "La revoca di reserve e di obiezioni a riserve", *Rivista di diritto internazionale*, 1994, p. 319.

[814] See particularly, in the questionnaire addressed to States, questions 1.6, 1.6.1, 1.6.2 and 1.6.2.1 relating to withdrawal of reservations.

[815] See the examples given by P.-H. Imbert, footnote 25 above, p. 287, footnote 19, or by F. Horn, footnote 25 above, p. 437, footnote 1. See also, for example, the Convention relating to the Status of Refugees, of 28 July 1951, art. 42, para. 2; the Convention on the Continental Shelf, of 29 April 1958, art. 12, para. 1; the European Convention on Establishment, of 13 December 1955, art. 26, para. 3; or the 1962 model clause of the Council of Europe, which appears in "Models of final clauses", given in a Memorandum of the Secretariat (CM (62) 148, 13 July 1962, pp. 6 and 10).

[816] See, for example, the European Patent Convention (Munich Convention) of 5 October 1973, art. 167, para. 4, and other examples cited by P.-H. Imbert, footnote 25 above, p. 287, footnote 20, or by F. Horn, footnote 25 above, p. 437, footnote 2.

[817] See the examples cited in the commentary to guideline 2.5.3.

[818] One favoured occasion for the withdrawal of reservations is at the time of a succession of States, for on that date the newly independent State can express its intention of not maintaining the reservations of the predecessor State (cf. the 1978 Vienna Convention on Succession of States in respect of Treaties, art. 20, para. 1). This situation is examined in Part 5 of the Guide to Practice

withdraws a previous reservation,[819] although the Commission knows of no case in which this has occurred.[820]

(14) The now customary nature of the rules contained in articles 22, paragraph 1, and 23, paragraph 4, of the 1969 and 1986 Vienna Conventions and reproduced in guideline 2.5.1 seems not to be in question[821] and is in line with current practice.[822]

(15) The wording chosen does not call for any particular criticism, although some fault could be found with the first phrase ("Unless the treaty provides otherwise …"). This precision, which appeared in the Commission's final draft, but not in that of 1962,[823] was added by the Special Rapporteur, Sir Humphrey Waldock, following comments by Governments[824] and endorsed by the Drafting Committee at the seventeenth session in 1965.[825] It goes without saying that most of the provisions of the Vienna Conventions and all the rules of a procedural nature contained in them are of a residual, voluntary nature and must be understood to apply "unless the treaty otherwise provides". The same must therefore be true, *a fortiori*, of the Guide to Practice. The explanatory phrase that introduces article 22, paragraph 1, may seem superfluous, but the Commission takes the view that this is not sufficient cause for modifying the wording chosen in 1969 and retained in 1986.

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on reservations in cases of succession of States.

[819] This eventuality is expressly provided for by the final clauses of the Convention concerning Customs Facilities for Touring, its Additional Protocol and the Customs Convention on the Temporary Importation of Private Road Vehicles, all of 4 June 1954 (para. 5); see *Yearbook … 1965*, vol. II, p. 105, document A/5687, Part Two, annex II, para. 2. There are a considerable number of cases in which a State has made a reservation on signing a treaty, but subsequently renounced it because of representations made either by other signatories or by the depositary (cf. the examples given by F. Horn, footnote 25 above, pp. 345–346); but these are not strictly speaking withdrawals: see paragraphs (7) and (8) of the commentary to guideline 2.5.2.

[820] On the other hand, several cases of withdrawal of a reservation fairly soon after it had been made can be cited. See, for example, Estonia's reply to question 1.6.2.1 of the Commission's questionnaire: the restrictions on its acceptance of annexes III-V of the International Convention for the Prevention of Pollution from Ships of 1973 (MARPOL Convention) (as modified by its Protocol of 1978), to which it had acceded on 2 December 1991, were lifted on 28 July 1992, when Estonia was considered to be in a position to observe the conditions laid down in these instruments. The United Kingdom states that it withdrew, retrospectively from the date of ratification and three months after formulating it, a reservation to the 1959 Agreement Establishing the Inter-American Development Bank.

[821] Cf. L. Migliorino, footnote 813 above, pp. 320–321, or R. Szafarz, footnote 27 above, p. 313; A. Pellet, *Commentaire de l'article 22 (1969)*, footnote 779 above, pp. 944–945, paras. 22–25 and A. Pellet and W. Schabas, *Commentaire de l'article 23 (1969)*, footnote 450 above, p. 975, para. 7; A. Pellet, 1969 Vienna Convention Article 22, footnote 779 above, pp. 574–575, paras. 22–25, and A. Pellet and W. Schabas, 1969 Vienna Convention Article 23, footnote 450 above, p. 596, para. 7.

[822] Cf. the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties …*, footnote 79 above, p. 64, para. 216. The few States that made any comment on this subject in their replies to the questionnaire on reservations (question 1.6.2.1) said that any withdrawals of reservations had followed a change in their domestic law (Colombia, Denmark, Israel, Sweden, Switzerland, United Kingdom, United States of America) or a reassessment of their interests (Israel). On reasons for withdrawal, see Jean-François Flauss, "Note sur le retrait par la France des réserves aux traités internationaux", *A.F.D.I.*, 1986, pp. 860–861.

[823] See paragraphs (3) and (5) above.

[824] Fourth report on the law of treaties, *Yearbook … 1965*, vol. II, pp. 55–56; see also *ibid.*, vol. I, 800th meeting, 11 June 1965, p. 174, para. 45.

[825] *Ibid.*, 814th meeting, 29 June 1965, p. 272, para. 22.

2.5.2 Form of withdrawal

The withdrawal of a reservation must be formulated in writing.

Commentary

(1) The guideline reproduces the wording of article 23, paragraph 4, which is worded in the same way in both the 1969 and the 1986 Vienna Conventions.

(2) Whereas draft article 17, paragraph 7, adopted on first reading by the Commission in 1962 required that the withdrawal of a reservation should be effected "by written notification",[826] the 1966 draft was silent regarding the form of withdrawal. Several States made proposals to restore the requirement of written withdrawal[827] with a view to bringing the provision "into line with article 18 [23 in the final text of the Convention], where it was stated that a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing".[828] Although K. Yasseen considered that "an unnecessary additional condition [was thereby introduced] into a procedure which should be facilitated as much as possible",[829] the principle was unanimously adopted,[830] and it was decided to include this provision not in article 20 itself but in article 23, which dealt with "Procedure regarding reservations" in general and was, as a result of the inclusion of this new paragraph 4, placed at the end of the section.[831]

(3) Although Yasseen had been right, at the 1969 Conference, to emphasize that the withdrawal procedure "should be facilitated as much as possible",[832] the burden imposed on a State by the requirement of written withdrawal should not be exaggerated. Moreover, although the rule of parallelism of forms is not an absolute principle in international law,[833] it would be incongruous if a reservation, about which there can be no doubt that it must be in writing,[834] could be withdrawn simply through an oral statement. This would result in considerable uncertainty for the other contracting States and organizations, which would have received the written text of the reservation but would not necessarily have been made aware of its withdrawal.[835]

(4) The Commission nevertheless considered whether the withdrawal of a reservation may not be implicit, resulting from circumstances other than its formal withdrawal.

(5) Certainly, as J.M. Ruda points out, "the withdrawal of a reservation … is not to be presumed".[836] Yet the question still arises as to whether certain acts or conduct on the part of

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[826] *Yearbook ... 1962*, vol. II, p. 75, document A/CN.4/144, p. 69; see paragraph (5) of the commentary to guideline 2.5.1.

[827] See the amendments proposed by Austria and Finland (A/CONF.39/C.1/L.4 and Add.1), Hungary (A/CONF.39/C.1/L.178 and A/CONF.39/L.17) and the United States of America (A/CONF.39/C.1/L.171), reproduced in (footnote 54 above), *Documents of the Conference*, documents of the Committee of the Whole, pp. 152–153 and 287.

[828] Statement by Mrs. Bokor-Szegó (Hungary) in *Official Records ...*, *ibid.*, p. 36, para. 13.

[829] *Ibid.*, p. 38, para. 39.

[830] *Ibid.*, para. 41.

[831] *Ibid.*, 29th meeting, 19 May 1969, p. 159, paras. 10–13. See J.M. Ruda, footnote 56 above, p. 194.

[832] See footnote 829 above.

[833] See paragraph (6) of the commentary to guideline 2.5.4.

[834] See guideline 2.1.1.

[835] In this connection, see J.M. Ruda, footnote 56 above, pp. 195–196.

[836] *Ibid.*, p. 196.

a State or an international organization ought not to be characterized as the withdrawal of a reservation.

(6) It is, for example, certainly the case that the conclusion between the same parties of a subsequent treaty containing provisions identical to those to which one of the parties had made a reservation, whereas it did not do so in connection with the second treaty, has, in practice, the same effect as a withdrawal of the initial reservation.[837] The fact remains, however, that this a separate instrument, and that the commitment thereby undertaken by the State that had made a reservation to the first treaty results from the second treaty, not the first; and that if, for example, a third State that is not a party to the second treaty acceded to the first, then the reservation would produce its full effects in the relations of that State with the author of the reservation.

(7) Likewise, the non-confirmation of a reservation upon signature, when a State expresses its consent to be bound,[838] cannot be interpreted as being a withdrawal of the reservation, which may well have been "formulated" but, for lack of formal confirmation, cannot under any circumstances be considered as having been "made".[839] The reserving State has simply renounced it after the time for reflection has elapsed between the date of signing and the date of ratification, act of formal confirmation, acceptance or approval.

(8) This reasoning has been disputed, largely on the grounds that the reservation exists even before it has been confirmed: it has to be taken into account when assessing the extent of the obligations incumbent on the signatory State (or international organization) under article 18 of the Conventions on the Law of Treaties; and, under article 23, paragraph 3, "an express acceptance or an objection does not need to be renewed if made before confirmation of the reservation".[840] Nevertheless, as the same writer says: "Where a reservation is not renewed [confirmed], whether expressly or not, no change occurs, either for the reserving State itself or in its relations with the other parties, since until that time the State was not bound by the treaty. Conversely, if the reservation is withdrawn after the deposit of the instrument of ratification or accession, the obligations of the reserving State are increased by virtue of the reservation, and it may be bound for the first time by the treaty with parties which had objected to its reservation. A withdrawal thus affects the application of the treaty, whereas non-confirmation has no effect at all, from this point of view."[841] The effects of non-confirmation and of withdrawal are thus too dissimilar for it to be possible to class the two institutions together.

(9) It likewise seems impossible to consider that an expired reservation has been withdrawn. It sometimes happens that a clause in a treaty places a limit on the period of

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[837] In this connection, see J.-F. Flauss, footnote 822 above, pp. 857–858, but see also F. Tiberghien, *La protection des réfugiés en France* (Paris, Économica, 1984), pp. 34–35 (quoted by Flauss, p. 858).

[838] Cf. the 1969 and 1986 Vienna Conventions, art. 23, para. 2, and guideline 2.2.1 and the commentary thereto in the report of the Commission on the work of its fifty-third session, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 464–472.

[839] Non-confirmation is, however, sometimes (wrongly) called "withdrawal"; cf. *Multilateral Treaties* ..., chap. VI.15, note 21, relating to the non-confirmation by the Indonesian Government of reservations formulated when it signed the Single Convention on Narcotic Drugs, 1961.

[840] P.-H. Imbert, footnote 25 above, p. 286.

[841] *Ibid.*, footnote omitted.

validity of reservations.[842] But the resulting expiration of the reservation is the consequence of the lapse of a fixed period of time, whereas withdrawal is a unilateral juridical act expressing the will of its author.

(10) The same applies when, as sometimes occurs, the reservation itself sets a time limit to its validity. Thus, in its reply to the questionnaire on reservations,[843] Estonia stated that it had limited its reservation to the European Convention on Human Rights to one year, since "one year is considered to be a sufficient period to amend the laws in question".[844] In this case, the reservation ceases to be in force not because it has been withdrawn, but because of the time limit set by the text of the reservation itself.

(11) What have been termed "forgotten reservations"[845] should also be mentioned. Specifically, a reservation is "forgotten" when it is connected with a provision of domestic law that has subsequently been amended by a new text that renders the reservation obsolete. This situation, which is not uncommon,[846] although a full assessment is difficult, and which is probably usually the result of negligence by the relevant authorities or insufficient consultation between the relevant services, has its drawbacks. Indeed, it can lead to legal uncertainty, particularly in States with a tradition of legal monism.[847] Moreover, since

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[842] See for example, article 12 of the Council of Europe Convention on the Unification of Certain Points of Substantive Law on Patents for Invention of 1963, which provides for the possibility of non-renewable reservations to some of its provisions for maximum periods of 5 or 10 years, while an annex to the European Convention on Civil Liability for Damage caused by Motor Vehicles of 1973 allows Belgium to make a reservation for a three-year period starting at the entry into force of the Convention. See also the examples given by S. Spiliopoulou Åkermark, footnote 101 above, pp. 499–500, or P.-H. Imbert, footnote 25 above, p. 287, footnote 21; also article 124 of the Rome Statute of the International Criminal Court of 17 July 1998, which sets a seven-year time limit on the possibility of non-acceptance of the Court's competence in respect of war crimes. Other Council of Europe conventions such as the Conventions on the Adoption of Children, of 24 April 1967, and the Legal Status of Children Born out of Wedlock, of 15 October 1975 likewise authorize only temporary, but renewable reservations; as a result of difficulties with the implementation of these provisions (see J. Polakiewicz, footnote 638 above, pp. 101–102), the new reservation clauses in Council of Europe conventions state that failure to renew a reservation would cause it to lapse (see the Criminal Law Convention on Corruption of 1999, art. 38, para. 2).

[843] Replies to questions 1.6 and 1.6.1.

[844] See also the example given by J. Polakiewicz, footnote 638 above, pp. 102–104. It can also happen that a State, when formulating a reservation, indicates that it will withdraw it as soon as possible (cf. the reservation by Malta to articles 13, 15 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women, *Multilateral Treaties ...*, chap. IV.8; see also the reservations by Barbados to the International Covenant on Civil and Political Rights, *ibid.*, chap. IV.4).

[845] J.-F. Flauss, footnote 822 above, p. 861, or F. Horn, footnote 25 above, p. 223.

[846] See J.-F. Flauss, footnote 822 above, p. 861; see pp. 861–862, the examples concerning France given by this author.

[847] In these States, judges are expected to apply duly ratified treaties (although not reservations) and these generally take precedence over domestic laws, even if the latter were adopted later (cf. article 55 of the French Constitution of 1958 and the many constitutional provisions, which either use the same wording or are inspired by it in French-speaking African countries). The paradoxical situation can thus arise that, in a State that has aligned its internal legislation with a treaty, it is nonetheless the treaty as ratified (and thus stripped of the provision or provisions to which reservations were made) that prevails, unless the reservation is formally withdrawn. The problem is less acute in States with a dualist system: international treaties are not applied as such, although, in all cases, national judges will apply the most recent domestic law.

domestic laws are "merely facts" from the standpoint of international law,[848] whether the legal system of the State in question is monist or dualist, an unwithdrawn reservation, having been made at the international level, will continue, in principle, to be fully effective, and the reserving State will continue to avail itself of the reservation with regard to the other parties, although such an attitude could be questionable in terms of the principle of good faith.

(12) These examples, taken together, show that the withdrawal of a reservation may never be implicit: a withdrawal occurs only if the author of the reservation declares formally and in writing, in accordance with the rule embodied in article 23, paragraph 4, of the Vienna Conventions and reproduced in guideline 2.5.2, that it intends to revoke it.

2.5.3 Periodic review of the usefulness of reservations

1. States or international organizations which have formulated one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

2. In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, consider the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

Commentary

(1) Treaty monitoring bodies, particularly but not exclusively in the field of human rights, are calling with increasing frequency on States to reconsider their reservations and, if possible, to withdraw them. These appeals are often relayed by the general policymaking bodies of international organizations such as the General Assembly of the United Nations and the Committee of Ministers of the Council of Europe.[849] Guideline 2.5.3 reflects these concerns.

(2) The Commission is aware that such a provision would have no place in a draft convention, since it could not be of much normative value. The Guide to Practice, however, does not aim to be a convention; it is, rather, a "code of recommended practices".[850] It would therefore not be out of place to draw its users' attention to the drawbacks of these "forgotten",

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[848] Cf. Permanent Court of International Justice, Judgment of 25 May 1926, *Certain German interests in Polish Upper Silesia*, Series A, No. 7, p. 19.

[849] See, among others, the following General Assembly resolutions: 65/200 of 21 December 2010 on the International Convention on the Elimination of All Forms of Racial Discrimination (para. 27); 65/197 of 21 December 2010 on the Rights of the child (para. 3); 64/152 of 18 December 2009 on International Covenants on Human Rights (para. 8); and 64/138 of 18 December 2009 on the Convention on the Elimination of All Forms of Discrimination against Women (para. 6). See also the Declaration of the Council of Europe Committee of Ministers adopted on 10 December 1998 on the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights and Parliamentary Assembly of the Council of Europe Recommendation 1671 (2004), adopted on 7 September 2004, on Ratification of protocols and withdrawal of reservations and derogations made in respect of the European Convention on Human Rights, and resolution 1391 (2004), adopted the same day, on Ratification of protocols and withdrawal of reservations and derogations made in respect of the European Convention on Human Rights, or, more generally (in that it is not limited to human rights treaties), Parliamentary Assembly of the Council of Europe Recommendation 1223 (1993), para. 7, dated 1 October 1993.

[850] This expression was used by Sweden in its comments on the Commission's 1962 draft on the law of treaties; see the fourth report of Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, p. 49.

obsolete or superfluous reservations[851] and the benefits of reconsidering them periodically with a view to withdrawing them totally or partially.

(3) It goes without saying that it is no more than a recommendation, as emphasized by the use of the conditional tense in both paragraphs of guideline 2.5.3 and of the word "consider" in the first paragraph and the words "where relevant" in the second, and that the parties to a treaty that have accompanied their consent to be bound by reservations remain absolutely free to withdraw their reservations or not. This is why the Commission has not thought it necessary to determine precisely the frequency with which reservations should be reconsidered.

(4) Similarly, in the second paragraph, the elements to be taken into consideration are cited merely by way of example, as shown by the use of the words "in particular". The reference to the integrity of multilateral treaties is an allusion to the drawbacks of reservations, which may undermine the unity of the treaty regime. The reference to careful consideration of internal law and developments in it since the reservations were formulated may be explained by the fact that the divergence from the treaty provisions of the provisions in force in the State party is often used to justify the formulation of a reservation. Domestic provisions are not immutable, however (and participation in a treaty should in fact be an incentive to modify them), so that it may happen — and often does[852] — that a reservation becomes obsolete because internal law has been brought into line with treaty requirements.

(5) The Commission considered the appropriateness of the words "internal law" as it applied to international organizations. It noted that article 46 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations contains "Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties".[853] The Commission nevertheless did not consider it necessary to include this expression in its entirety in guideline 2.5.3 so as not to burden the text unduly. Moreover, the phrase "internal law of an international organization" is commonly used as a way of referring to the "proper law"[854] of international organizations.[855]

2.5.4 Representation for the purpose of withdrawing a reservation at the international level

1. Subject to the usual practices followed in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of withdrawing a reservation made on behalf of a State or an international organization if:

(a) that person produces appropriate full powers for the purpose of that withdrawal; or

(b) it appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State or the international organization for such purpose without having to produce full powers.

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[851] In this connection, see paragraphs (9) to (11) of the commentary to guideline 2.5.2.

[852] See *ibid.*, para. (11).

[853] See the commentary to the corresponding draft article, adopted by the Commission in *Yearbook ... 1982*, vol. II, Part Two, p. 53, para. (2).

[854] See C.W. Jenks, footnote 292 above, p. 282.

[855] See Lazar Focsaneanu, "*Le droit interne de l'O.N.U.*", *A.F.D.I.*, 1957, pp. 315–349; P. Cahier, footnote 292 above, pp. 563–602; G. Balladore-Pallieri, footnote 292 above, pp. 1–38; and P. Daillier, M. Forteau and A. Pellet, footnote 254 above, pp. 640–642.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of withdrawing a reservation at the international level on behalf of that State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;

(b) representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted in that organization or organ;

(c) heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization.

Commentary

(1) The two Vienna Conventions of 1969 and 1986, while reticent on the procedure for the formulation of reservations,[856] are entirely silent as to the procedure for their withdrawal. The aim of guideline 2.5.4 is to repair that omission.[857]

(2) The question has not, however, been completely overlooked by several of the Commission's Special Rapporteurs on the law of treaties. Thus, in 1956, Sir Gerald Fitzmaurice proposed a provision under which the withdrawal of a reservation would be the subject of "formal notice",[858] but he did not specify who should notify whom or how notice should be given. Later, in 1962, Sir Humphrey Waldock, in his first report, went into more detail in draft article 17, paragraph 6, the adoption of which he recommended:

> "... Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty."[859]

(3) Although the proposal was not discussed in plenary, the Drafting Committee simply deleted it,[860] and it was not restored by the Commission. During the brief discussion of the Drafting Committee's draft, however, Waldock pointed out that "[n]otification of the withdrawal of a reservation would normally be made through a depositary".[861] This approach was approved by Israel, the only State to provide comments on the draft adopted on first reading on that matter,[862] and the Special Rapporteur proposed an amendment to the draft whereby the withdrawal "becomes operative when *notice of it has been received by the other States concerned from the depositary*".[863]

(4) During the discussion in the Commission, Waldock explained that the omission of a reference to the depositary on first reading had been due solely to "inadvertence",[864] and his

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[856] See paragraph (7) below.

[857] See A. Pellet and W. Schabas, "Commentaire de l'article 23 (1969)", footnote 450 above, pp. 976–977, para. 12; and A. Pellet and W. Schabas, 1969 Vienna Convention Article 23, footnote 450 above, p. 597, para. 12.

[858] See paragraph (2) of the commentary to guideline 2.5.1.

[859] *Yearbook ... 1962*, vol. II, p. 61; see also paragraph (3) of the commentary to guideline 2.5.1. The Special Rapporteur on the law of treaties did not accompany this part of his draft with any commentary (*ibid.*, p. 66).

[860] *Yearbook ... 1962*, vol. I, 664th meeting, 19 June 1962, p. 234, para. 67.

[861] *Ibid.*, para. 71.

[862] *Yearbook ... 1965*, vol. II, p. 55.

[863] *Ibid.*, p. 56; emphasis added. See the commentary to guideline 2.5.1, footnote 789 above.

[864] *Yearbook ... 1965*, vol. I, 800th meeting, 11 June 1965, p. 174, para. 45.

suggestion for remedying it was not disputed in principle. S. Rosenne, however, believed that it was "not as clear as it appeared"[865] and suggested the adoption of a single text grouping together all notifications made by the depositary.[866] Although the Drafting Committee did not immediately adopt this idea, this probably explains why its draft again omitted any reference to the depositary,[867] which is also not mentioned in the Commission's final draft[868] or in the text of the Convention itself.[869]

(5) To rectify the omissions in the Vienna Conventions regarding the procedure for the withdrawal of reservations, the Commission could have contemplated transposing the rules relating to the formulation of reservations. This is not, however, self-evident.

(6) On the one hand, it is by no means clear that the rule of parallelism of forms has been accepted in international law. In its commentary in 1966 on draft article 51 on the law of treaties relating to the termination of or withdrawal from a treaty by consent of the parties, the Commission concluded that "this theory reflects the constitutional practice of particular States and not a rule of international law. In its opinion, international law does not accept the theory of the '*acte contraire*'".[870] As Paul Reuter pointed out, however, the Commission "is really taking exception only to the formalist conception of international agreements: it feels that what one conceptual act has established, another can undo, even if the second takes a different form from the first. In fact, the Commission is really accepting a non-formalist conception of the theory of the *acte contraire*".[871] This nuanced position surely can and should be applied to the issue of reservations: it is not essential that the procedure followed in withdrawing a reservation should be identical with that used for formulating it (particularly since a withdrawal is generally welcome). The withdrawal should, however, leave all the contracting States or contracting organizations in no doubt as to the will of the State or the international organization which takes that step to renounce its reservation. It therefore seems reasonable to proceed on the basis of the idea that the procedure for withdrawing reservations should be modelled on the procedure for formulating them, although that may involve some adjustment and fine-tuning where appropriate.

(7) On the other hand, it must be said that the Vienna Conventions contain few rules specifically relating to the procedure for formulating reservations, apart from article 23, paragraph 1, which merely states that they must be "communicated to the contracting States [and contracting organizations] and other States [and other international organizations] entitled to become parties to the treaty".[872]

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[865] *Ibid.*, p. 176, para. 65.

[866] See *ibid.*, 803rd meeting, 16 June 1965, pp. 197–199, paras. 30–56; for the text of the proposal, see *Yearbook ... 1965*, vol. II, p. 73.

[867] See *ibid.*, 814th meeting, 29 June 1965, p. 272, para. 22, and the comments by S. Rosenne and Sir Humphrey, *ibid.*, paras. 26–28.

[868] Art. 20, para. 2; see the text of this provision in paragraph (5) of the commentary to guideline 2.5.1.

[869] Cf. articles 22 and 23 of the 1969 and 1986 Vienna Conventions.

[870] See paragraph (3) of the commentary to draft article 51, *Yearbook ... 1966*, vol. II, p. 249; see also the commentary to article 35, *ibid.*, pp. 232–233.

[871] P. Reuter, footnote 28 above, p. 141, para. 211 (original italics). See also I. Sinclair, footnote 129 above, p. 183. For a flexible position on the denunciation of a treaty, see International Court of Justice (ICJ), decision of 21 June 2000, *Aerial Incident of 10 August 1999 (Competence of the Court), I.C.J. Reports 2000*, p. 25, para. 28.

[872] Guideline 2.1.5, paragraph 1, reproduces this provision, while paragraph 2 details the procedure to be followed when the reservation relates to the constituent instrument of an international organization.

(8) Since there is no treaty provision directly concerning the procedure for withdrawing reservations, and in view of the inadequacy even of those relating to the formulation of reservations, the Commission considered guidelines 2.1.5 to 2.1.7 relating to the communication of reservations in the light of current practice and the (rare) discussions of theory and discussed the possibility and the appropriateness of transposing them to the withdrawal of reservations.

(9) With regard to the formulation of reservations, guideline 2.1.3 is taken directly from article 7 of the Vienna Conventions entitled "Full powers". There seems no reason why these rules should not also apply to the withdrawal of reservations. The grounds on which they are justified in relation to the formulation of reservations[873] apply also to withdrawal: the reservation has altered the respective obligations of the reserving State and the other contracting States or contracting organizations and should therefore be issued by the same individuals or bodies with competence to bind the State or international organization at the international level. This must therefore apply *a fortiori* to its withdrawal, which puts the seal on the reserving State's commitment.

(10) The United Nations Secretariat firmly adopted that position in a letter dated 11 July 1974 to the Legal Adviser of the Permanent Mission of a Member State who had inquired about the "form in which the notifications of withdrawal" of some reservations made in respect of the Convention on the Political Rights of Women of 31 March 1953 and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 10 December 1962 should be made.[874] After noting that the Vienna Convention makes no reference to the subject and recalling the definition of "full powers" given in article 2, paragraph 1 (c),[875] the author of the letter adds:

> "Clearly the withdrawal of a reservation constitutes an important transaction and one of those for which the production of full powers should certainly be contemplated. It would appear only logical to apply to a notification of withdrawal of reservations the same standard as to the formulation of reservations since the withdrawal would entail as much change in the application of the treaty concerned as the original reservations."

And the author went on to conclude:

> "Our views, therefore, are that the withdrawal of reservations should *in principle* be notified to the Secretary-General either by the Head of State or Government or the Minister for Foreign Affairs, or by an official authorized by one of those authorities. While such a high level of procedure may prove somewhat burdensome, the fundamental safeguard which it provides to all concerned in regard to the validity of the notification more than makes up for the resulting inconvenience."[876]

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[873] See paragraphs (8) to (12) of the commentary to guideline 2.1.3.

[874] *United Nations Juridical Yearbook*, 1974, pp. 190–191.

[875] "[The Vienna Convention] defines 'full powers' as 'a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty'."

[876] Original italics. A memorandum by the Secretariat dated 1 July 1976 confirms this conclusion: "A reservation must be formulated in writing (art. 23, para. 1, of the [Vienna] Convention), and both reservations *and withdrawals* of reservations must emanate from one of the three authorities (Head of State, Head of Government or Minister for Foreign Affairs) competent to bind the State internationally (art. 7 of the Convention)" (*United Nations Juridical Yearbook*, 1976, p. 211 – emphasis added).

(11) Firm though this conclusion is, the words "in principle", which appear in italics in the text of the Secretariat's legal advice, testify to a certain unease. This is explained by the fact that, as the writer of the letter acknowledges,

> "On several occasions, there has been a tendency in the Secretary-General's depositary practice, with a view to a broader application of treaties, to receive in deposit withdrawals of reservations made in the form of notes verbales or letters from the Permanent Representative to the United Nations. It was considered that the Permanent Representative, duly accredited with the United Nations and acting upon instructions from his Government, by virtue of his functions and without having to produce full powers, had been authorized to do so."[877]

(12) This raises a question that the Commission has already considered in relation to the formulation of reservations:[878] would it not be legitimate to assume that the representative of a State to an international organization that is the depositary of a treaty (or the ambassador of a State accredited to a depositary State) has been recognized as being competent to give notice of reservations? And the question arises with all the more force in relation to the withdrawal of reservations, since there may be a hope of facilitating such a step, which would have the effect of making the treaty more fully applicable and thus be instrumental in preserving, or re-establishing, its integrity.

(13) After thorough consideration, however, the Commission did not adopt this progressive development, since it was anxious to depart as little as possible from the provisions of article 7 of the Vienna Conventions. On the one hand, it would be strange to depart, without a compelling reason, from the principle of the *acte contraire*,[879] so long as it is understood that a "non-formalist conception"[880] of it is advisable. This means, in the present case, that any of the authorities competent to formulate a reservation on behalf of a State may also withdraw it and that the withdrawal need not necessarily be issued by the same body as the one which formulated the reservation. On the other hand, while it is true that there may well be a desire to facilitate the withdrawal of reservations, it is also the case that withdrawal resembles more closely than the formulation of reservations the expression of consent to be bound by a treaty. This constitutes a further argument for not departing from the rules contained in article 7 of the Vienna Conventions.

(14) Moreover, it seems that the United Nations Secretary-General has since adopted a harder line and no longer accepts notification or withdrawal of reservations from permanent representatives accredited to the Organization.[881] And in the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* the Treaty Section of the Office of Legal Affairs states: "Withdrawal must be made in writing and under the signature of one of the three recognized authorities, since such withdrawal shall normally result, in substance, in a

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[877] *United Nations Juridical Yearbook*, 1974, pp. 190–191. This is confirmed by the memorandum of 1 July 1976: "On this point, the Secretary-General's practice in some cases has been to accept the withdrawal of reservations simply by notification from the representative of the State concerned to the United Nations", *United Nations Juridical Yearbook*, 1976, p. 211, note 121.

[878] See paragraphs (13) to (17) of the commentary to guideline 2.1.3.

[879] See paragraph (6) above.

[880] See Paul Reuter's phrase, *ibid.*

[881] Flauss mentions, however, a case in which a reservation by France (to article 7 of the Convention on the Elimination of All Forms of Discrimination against Women, of 1 March 1980) was withdrawn on 22 March 1984 by the Permanent Mission of France to the United Nations (J.-F. Flauss, footnote 822 above, p. 860).

modification of the scope of the application of the treaty."[882] There is no mention of any possible exceptions.

(15) The Secretary-General of the United Nations is not, however, the only depositary of multilateral treaties, and the practice followed by other depositaries in this regard could usefully be considered. Unfortunately, the replies from States to the questionnaire on reservations give no information of any practical benefit in that direction. On the other hand, publications of the Council of Europe indicate that it accepts the formulation[883] and withdrawal[884] of reservations by letters from permanent representatives to the Council.

(16) It would be regrettable if such practices, which are perfectly acceptable and do not seem to give rise to any particular difficulties, were to be called into question by the inclusion of overly rigid rules in the Guide to Practice. That pitfall is avoided in the text adopted for guideline 2.5.4, which transposes to the withdrawal of reservations the wording of guideline 2.1.3 while taking care to maintain the "customary practices in international organizations which are depositaries of treaties".

(17) Even apart from the replacement of the word "formulate" by the word "withdraw", however, the transposition is not entirely word for word:

- Since the withdrawal procedure is, by definition, distinct both from that used in adopting or authenticating the text of a treaty and from the expression of consent to be bound and may take place many years later, it is necessary that the person applying the procedure should produce specific full powers (para. 1 (a));
- For the same reason, paragraph 2 (b) of guideline 2.1.3 cannot apply to the withdrawal of reservations: when a State or an international organization comes to withdraw a reservation, the international conference which adopted the text is obviously no longer in session.

2.5.5 Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations

1. The competent authority and the procedure to be followed at the internal level for withdrawing a reservation are determined by the internal law of each State or the relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations for the purpose of invalidating the withdrawal.

Commentary

(1) Guideline 2.5.5 is, in relation to the withdrawal of reservations, the equivalent of guideline 2.1.4 relating to the "Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations".

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[882] *Summary of Practice* ... footnote 75 above, p. 64, para. 216.

[883] See paragraph (14) of the commentary to guideline 2.1.3.

[884] Cf. European Committee on Legal Cooperation (CDCJ), *CDCJ Conventions and reservations to those Conventions*, Note by the Secretariat drafted by the Directorate-General of Legal Affairs, CDCJ (99) 36, 30 March 1999.

(2) The competent authority to formulate the withdrawal of a reservation at the international level is not necessarily the same as the one having competence to decide the issue at the internal level. Here, too, *mutatis mutandis*,[885] the problem is the same as that relating to the formulation of reservations.[886]

(3) The replies by States and international organizations to the questionnaire on reservations do not give any usable information regarding competence to decide on the withdrawal of a reservation at the internal level. The literature, however, provides certain indications in that respect.[887] A more exhaustive study would very probably reveal the same diversity in relation to internal competence to withdraw reservations as has been noted with regard to their formulation.[888] There seems to be no reason, therefore, why the wording of guideline 2.1.4 should not be transposed to the withdrawal of reservations.

(4) It would in particular seem essential to indicate in the Guide to Practice whether and to what extent a State can claim that the withdrawal of a reservation is not valid because it violates the rules of its internal law; this situation could very well arise in practice, even though a specific example does not appear to exist.

(5) As the Commission indicated in relation to the formulation of reservations,[889] there might be a case for applying to reservations the "defective ratification" rule of article 46 of the Vienna Conventions, and still more to the withdrawal of reservations, given that the process of ratification or accession is thereby completed. Whether the formulation of reservations or, to an even greater extent, their withdrawal is involved, the relevant rules are seldom spelt out in formal texts of a constitutional or even a legislative nature.[890]

(6) The Commission wondered whether it would not be more elegant simply to refer the reader to guideline 2.1.4, of which guideline 2.5.5 is a word-for-word transposition, with the simple replacement of the words "formulation" and "formulate" by the words "withdrawal" and "withdraw". Contrary to the position it took with regard to guideline 2.5.6, the Commission decided that it would be preferable in the present case to opt for the reproduction of guideline 2.1.4: guideline 2.5.5 is inextricably linked with guideline 2.5.4, for which a simple reference is impossible.[891] It seems preferable to proceed in the same manner in both cases.

2.5.6 Communication of withdrawal of a reservation

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 and 2.1.7.

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[885] A reservation "removed" from the treaty; its withdrawal serves as the culmination of its acceptance.

[886] See the commentary to guideline 2.1.4.

[887] See, for example, G. Gaja, "Modalità singolari per la revoca di una reserva", *Rivista di diritto internazionale*, 1989, pp. 905–907, or Luigi Migliorino, footnote 813 above, pp. 332–333, in relation to the withdrawal of a reservation by Italy to the 1951 Convention relating to the Status of Refugees or, for France, J.-F. Flauss, footnote 822 above, p. 863.

[888] See paragraphs (3) to (6) of the commentary to guideline 2.1.4.

[889] *Ibid.*, para. (10).

[890] These uncertainties also explain the hesitation of the few authors who have tackled the question (see footnote 887 above). If a country's own specialists in these matters are in disagreement among themselves or criticize the practices of their own Government, other States or international organizations cannot be expected to delve into the mysteries and subtleties of internal law.

[891] See paragraph (17) of the commentary to guideline 2.5.4.

Commentary

(1) As the Commission has noted elsewhere,[892] the Vienna Conventions are completely silent as to the procedure for the communication of withdrawal of reservations. Article 22, paragraph 3 (a), undoubtedly implies that the contracting States and international organizations should be notified of a withdrawal, but it does not specify either who should make this notification or the procedure to be followed. Guideline 2.5.6 serves to fill that gap.

(2) To that end, the Commission used the same method as for the formulation of a withdrawal *stricto sensu*[893] and considered whether it might not be possible and appropriate to transpose guidelines 2.1.5 to 2.1.7, which it had adopted on the communication of reservations themselves.

(3) The first remark that must be made is that, although the Vienna Conventions do not specify the procedure to be followed for withdrawing a reservation, the *travaux préparatoires* of the 1969 Convention show that those who drafted the law of treaties were in no doubt about the fact that:

- notification of withdrawal must be made by the depositary, if there is one; and
- the recipients of the notification must be "every State which is or is entitled to become a party to the treaty" and "interested States".[894]

(4) It is only because, at least partly at the instigation of Rosenne, it was decided to group together all the rules relating to depositaries and notification, which constitute articles 76 to 78 of the 1969 Vienna Convention,[895] that these proposals were abandoned.[896] They are, however, entirely consistent with guidelines 2.1.5 and 2.1.6.

(5) This approach is endorsed by the literature,[897] meagre though it is, and is also in line with current practice. Thus:

- Both the Secretary-General of the United Nations[898] and the Secretary-General of the Council of Europe[899] observe the same procedure on withdrawal as on the communication of reservations: they are the recipients of withdrawals of reservations made by States or international organizations to treaties of which they are depositaries, and they communicate them to all the contracting States or contracting organizations and the States and international organizations entitled to become parties;

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[892] See *ibid.*, para. (1).

[893] *Ibid*, para. (8).

[894] *Ibid*, paras. (2) and (3).

[895] And arts. 77–79 of the 1986 Vienna Convention.

[896] See paragraph (4) of the commentary to guideline 2.5.4.

[897] See L. Migliorino, footnote 813 above, at p. 323, or A. Maresca, footnote 351 above, p. 302 or A. Pellet and W. Schabas, *Commentaire de l'article 23 (1969)* footnote 450 above, pp. 1014–1017, paras. 107–113; and A. Pellet and W. Schabas, 1969 Vienna Convention Article 23, footnote 450 above, pp. 623–625, paras. 110–116.

[898] See *Multilateral Treaties ...*, *passim* (see, among many other examples, the withdrawal of reservations to the Vienna Convention on Diplomatic Relations of 18 April 1961 by China (chap. III.3), Egypt (*ibid.*) or Mongolia (*ibid.*); to the International Covenant on Civil and Political Rights of 16 December 1966 by Australia, Belarus, Belgium, Finland, France, Iceland, Ireland, Italy, Lichtenstein, Mexico, the Netherlands, Norway, the Republic of Korea, Switzerland and the United Kingdom (*ibid.*, chap. IV.4); or to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 by Colombia, Jamaica and the Philippines (*ibid.*, chap. VI.19)).

[899] See European Committee on Legal Cooperation (CDCJ), *Conventions and Reservations to those Conventions*, note by the Secretariat drafted by the Directorate-General of Legal Affairs, CDCJ (1999) (see the withdrawal of reservations by Germany and Italy to the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in cases of Multiple Nationality of 1963, pp. 11 and 12); see also the brochure issued by the Directorate of Legal Advice and Public International Law, 2009, p. 2. For an example, see notification by Poland of

- Moreover, where treaty provisions expressly relate to the procedure to be followed in respect of withdrawal of reservations, they generally follow the model used for the formulation of reservations, in line with the rules given in guidelines 2.1.5 and 2.1.6, in that they specify that the depositary must be notified of a withdrawal[900] and even that he should communicate it to the contracting States[901] or, more broadly, to "every State entitled to become party" or to "every State", without specifying further.[902]

(6) As for the depositary, there is no reason to give him a role different from the extremely limited one assigned to it for the formulation of reservations in guidelines 2.1.6 and 2.1.7, which are a combination of article 77, paragraph 1, and article 78, paragraphs 1 (d) and 2, of the 1986 Vienna Convention[903] and are consistent with the principles on which the relevant Vienna rules are based:[904]

- Under article 78, paragraph 1 (e), the depositary is given the function of "informing the Parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty"; notifications relating to reservations and their withdrawal are covered by this provision, which appears in modified form in guideline 2.1.6, paragraph (1) (ii);
- The first paragraph of guideline 2.1.7 is based on the provision contained in article 78, paragraph 1 (d), under which the depositary should examine whether "notification or communication relating to the treaty is in due and proper form and, if need be, [bring] the matter to the attention of the State or international organization in question"; this, too, applies equally well to the formulation of reservations and to their withdrawal (which could cause a problem with regard to, for example, the person making the communication);[905]

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the withdrawal of its reservations to the Criminal Law Convention on Corruption, addressed to all member States and to Belarus (doc. JJ6871 Tr./173-102 of 19 June 2009).

[900] See, for example, the Convention on the Contract for the International Carriage of Goods by Road, of 19 May 1956, art. 48, para. 2; the Convention on the Limitation Period in the International Sale of Goods, as amended, of 1 August 1988, art. 40, para. 2; the Convention on the fight against corruption involving officials of the European Communities or officials of member States of the European Union of 26 May 1997, art. 15, para. 2; or the Council of Europe Convention on Cybercrime of 23 November 2001, art. 43, para. 1.

[901] See, for example, the European Agreement on Road Markings of 13 December 1957, arts. 15, para. 2, and 17 (b), or the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, of 26 October 1961, arts. 18 and 34 (c).

[902] See, for example, the Convention on Psychotropic Substances of 21 February 1971, arts. 25, para. 1, and 33, the Customs Convention on Containers of 2 December 1972, arts. 26, para. 3, and 27, the International Convention on the Harmonization of Frontier Control of Goods of 21 October 1982, arts. 21 and 25, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (notification to be made "to Member States of the Hague Conference on Private International Law"), art. 63, or the Council of Europe Convention on the avoidance of statelessness in relation to State succession of 19 May 2006, art. 22.

[903] These correspond to articles 77 and 78 of the 1969 Convention.

[904] See the commentary to guidelines 2.1.6 and 2.1.7.

[905] See paragraphs (10) and (11) of the commentary to guideline 2.5.4.

- The second paragraph of the same guideline carries through the logic of the "letter-box depositary" theory endorsed by the Vienna Conventions in cases where a difference arises. It reproduces word for word the text of article 78, paragraph 2, of the 1986 Convention and, again, there seems no need to make a distinction between formulation and withdrawal.

(7) Since the rules contained in guidelines 2.1.5 to 2.1.7 are in every respect transposable to the withdrawal of reservations, should they be merely referred to or reproduced in their entirety? In relation to the formulation of reservations, the Commission preferred to reproduce and adapt guidelines 2.1.3 and 2.1.4 in guidelines 2.5.4 and 2.5.5. That position was, however, primarily dictated by the consideration that simply transposing the rules governing competence to formulate a reservation to competence to withdraw it was impossible.[906] The same does not apply to the communication of withdrawal of reservations or the role of the depositary in that regard: the text of guidelines 2.1.5, 2.1.6 and 2.1.7 fits perfectly, with the simple replacement of the word "formulation" by the word "withdrawal". The use of a cross-reference thus has fewer disadvantages.

2.5.7 Effects of withdrawal of a reservation

1. The withdrawal of a reservation entails the full application of the provisions to which the reservation relates in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

2. The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation.

Commentary

(1) In the abstract, it is not very logical to insert guidelines relating to the effect of the withdrawal of a reservation in a section of the Guide to Practice dealing with the procedure for reservations, particularly since it is scarcely possible to dissociate the effect of the withdrawal from that of the reservation itself: the one cancels out the other. After some hesitation, however, the Commission decided to do so, for two reasons:

- In the first place, article 22 of the Vienna Conventions links the rules governing the form and procedure[907] of a withdrawal closely with the question of its effect; and
- In the second place, the effect of a withdrawal may be viewed as being autonomous, thus precluding the need to go into the infinitely more complex effect of the reservation itself.

(2) Article 22, paragraph 3 (a), of the Vienna Conventions is concerned with the effect of the withdrawal of a reservation only in relation to the particular question of the time at which the withdrawal "becomes operative". During the *travaux préparatoires* of the 1969

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[906] See paragraph (17) of the commentary to guideline 2.5.4 and paragraph (6) of the commentary to guideline 2.5.5.

[907] Admittedly, only to the extent that paragraph 3 (a) refers to the "notice" of a withdrawal.

Convention, however, the Commission occasionally considered the more substantial question of how it would be operative.

(3) In his first report on the law of treaties, Sir Gerald Fitzmaurice proposed a provision that, where a reservation is withdrawn, the previously reserving State becomes automatically bound to comply fully with the provision of the treaty to which the reservation related and is equally entitled to claim compliance with that provision by the other parties.[908] Draft article 22, paragraph 2, adopted by the Commission on first reading in 1962, provided that "upon withdrawal of a reservation, the provisions of article 21 [relating to the application of reservations] cease to apply";[909] this sentence disappeared from the Commission's final draft.[910] In plenary, Sir Humphrey Waldock suggested that the Drafting Committee might discuss a further question, namely, "the possibility that the effect of the withdrawal of a reservation might be that the treaty entered into force in the relations between two States between which it had not previously been in force",[911] while during the Vienna Conference several amendments were made with a view to re-establishing a provision to that effect in the text of the Convention.[912]

(4) The Drafting Committee of the Conference rejected the proposed amendments, on the grounds that they were superfluous and that the effect of the withdrawal of a reservation was self-evident.[913] This is only partially true.

(5) There can be no doubt that "the effect of withdrawal of a reservation is obviously to restore the original text of the treaty".[914] A distinction should, however, be drawn between three possible situations.

(6) In the relations between the reserving and the accepting State (or international organization) (art. 20, para. 4, of the Vienna Conventions), the reservation ceases to be operational (art. 21, para. 1): "In a situation of this kind, the withdrawal of a reservation will have the effect of re-establishing the original content of the treaty in the relations between the reserving and the accepting State. The withdrawal of the reservation produces the situation that would have existed if the reservation had not been made." ("*Intervendendo in una situazione di questo tipo, la revoca della riserva avrà l'effeto di ristablire il contenuto originario del trattato nei rapporti tra lo Stato riservante e lo Stato che ha accettato la riserva. La revoca della reserva crea quella situazione giuridica che sarebbe esistita se la reserva non fosse stata appostata.*")[915] Migliorino gives the example of the withdrawal by Hungary, in 1989, of its reservation to the Single Convention on Narcotic Drugs, 1961, article 48, paragraph 2, of which provides for the competence of the International Court of

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[908] *Yearbook ... 1956*, vol. II, p. 118, document A/CN.4/101, art. 40, para. 3.

[909] *Yearbook ... 1962*, vol. II, p. 181.

[910] It was discarded on second reading following consideration by the Drafting Committee of the new draft article proposed by Sir Humphrey Waldock, who retained it in part (see the commentary to guideline 2.5.8, para. 4), without offering any comment (see *Yearbook ... 1965*, vol. I, 814th meeting, 29 June 1965, p. 272, para. 22).

[911] *Ibid.*, 800th meeting, 14 June 1965, p. 178, para. 86; in that context, see S. Rosenne, *ibid.*, para. 87.

[912] Amendment by Austria and Finland (A/CONF.39/C.1/L.4 and Add.1); see *Documents of the Conference*, footnote 54 above, Committee of the Whole, documents with a sub-amendment by the USSR (A/CONF.39/C.1/L.167, *ibid.*).

[913] Summary records, footnote 35 above, Committee of the Whole, 70th meeting (14 May 1968), statement by K. Yasseen, Chairman of the Drafting Committee, p. 417, para. 37.

[914] D. Bowett, footnote 150 above, p. 87. See also R. Szafarz, footnote 27 above, p. 313.

[915] Luigi Migliorino, footnote 813 above, p. 325; in this connection, see also R. Szafarz, footnote 27 above, p. 314.

Justice;[916] there had been no objection to this reservation and, as a result of the withdrawal, the Court's competence to interpret and apply the Convention was established from the effective date of the withdrawal.[917]

(7) The same applies to the relations between the State (or international organization) that withdraws a reservation and a State (or international organization) that has objected to but not opposed the entry into force of the treaty between itself and the reserving State. In this situation, under article 21, paragraph 3, of the Vienna Conventions, the provisions to which the reservation related did not apply in the relations between the two parties: "In a situation of this kind, the withdrawal of a reservation has the effect of extending, in the relations between the reserving and the objecting State, the application of the treaty to the provisions covered by the reservation."[918]

(8) The most radical effect of the withdrawal of a reservation occurs where the objecting State or international organization had opposed the entry into force of the treaty between itself and the reserving State or organization. In this situation, the treaty enters into force[919] on the date on which the withdrawal takes effect. "For a State ... which had previously expressed a maximum-effect objection, the withdrawal of the reservation will mean the establishment of full treaty relations with the reserving State."[920]

(9) In other words the withdrawal of a reservation entails the application of those provisions of the treaty to which the reservation applied in their entirety (but not necessarily of the treaty as a whole if any other reservations exist) in the relations between the State or international organization that withdraws the reservation and all the other contracting States or contracting organizations, whether they had accepted or objected to the reservation, although, in the second case, if the objecting State or international organization had opposed the entry into force of the treaty between itself and the author of the reservation by reason of the reservation in question, the treaty enters into force from the effective date of the withdrawal.

(10) In the latter case, treaty relations between the author of the reservation and the author of the objection are established even where other reservations remain, since the opposition of the State or international organization to the entry into force of the treaty was due to the objection to the withdrawn reservation. The other reservations become operational, in accordance with the provisions of article 21 of the Vienna Conventions, as from the entry into force of the treaty in the relations between the two parties.

(11) It should also be noted that the wording of the first paragraph of the guideline follows that of the Vienna Conventions, in particular article 2, paragraph 1 (d), and article 23, which assume that a reservation refers to treaty provisions (in the plural). It goes without saying that

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[916] *Multilateral Treaties* ..., chap. VI.15.

[917] L. Migliorino, footnote 813 above, pp. 325–326.

[918] *Ibid.*, pp. 326–327; the author gives the example of the withdrawal by Portugal, in 1972, of its reservation to the Vienna Convention on Diplomatic Relations of 1961, art. 37, para. 2, which gave rise to several objections by States which did not, nevertheless, oppose the entry into force of the Convention between them and Portugal (see *Multilateral Treaties* ..., chap. III.3, footnote 23).

[919] See article 24 of the Vienna Conventions, especially para. 3.

[920] R. Szafarz, footnote 27 above, pp. 315 and 316; in that connection, see M.M. Ruda, footnote 56 above, p. 202; D. Bowett, footnote 150 above, p. 87, and L. Migliorino, footnote 813 above, pp. 328–329. The latter gives the example of the withdrawal by Hungary, in 1989, of its reservation to the 1969 Vienna Convention, art. 66 (see *Multilateral Treaties* ...., chap. XIII.1); this example is not really convincing, since the objecting States had not formally rejected the application of the Convention in the relations between themselves and Hungary.

the reservation can be made to only one provision or, in the case of an "across-the-board" reservation, to "the treaty as a whole with respect to certain specific aspects".[921] The first paragraph of guideline 2.5.7 covers both of these cases.

2.5.8 Effective date of withdrawal of a reservation

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

Commentary

(1) Guideline 2.5.8 reproduces the text of the *chapeau* and subparagraph (a) of article 22, paragraph 3, of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

(2) This provision, which reproduces the 1969 text with the sole addition of the reference to international organizations, was not specifically discussed during the *travaux préparatoires* of the 1986 Convention[922] or at the Vienna Conference of 1968–1969, which did no more than clarify[923] the text adopted on second reading by the Commission.[924] Its adoption had, however, given rise to some discussion in the Commission in 1962 and 1965.

(3) Whereas Sir Gerald Fitzmaurice had planned in his first report, in 1956, to spell out the effects of the withdrawal of a reservation,[925] Sir Humphrey Waldock expressed no such intention in his first report, in 1962.[926] It was, however, during the Commission's discussions in that year that, for the first time, a provision was included, at the request of Bartoš, in draft article 22 on the withdrawal of reservations, that such withdrawal "takes effect when notice of it has been received by the other States concerned".[927]

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[921] See guideline 1.1, paragraph 2.

[922] See Paul Reuter, fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations, *Yearbook ... 1975*, vol. II, p. 38, and fifth report, *Yearbook ... 1976*, vol. II (Part One), p. 146; for the (lack of) discussion by the Commission: *Yearbook ... 1977*, vol. I, 1434th meeting, 6 June 1977, p. 100, paras. 30–35 and 1435th meeting, 7 June 1977, p. 103, paras. 1 and 2; also 1451st meeting, 1 July 1977, p. 194, paras. 12–16, and the Commission's report of the same year, *ibid.*, vol. II (Part Two), pp. 114–116; and, for the second reading, see the tenth report of Paul Reuter, *Yearbook ... 1981*, vol. II (Part One), p. 63, para. 84; the (lack of) discussion at the 1652nd meeting, 15 May 1981, and 1692nd meeting, 16 July 1981, *Yearbook ... 1981*, vol. I, p. 54, paras. 27–28 and p. 265, para. 38, and the final text, *ibid.*, vol. II (Part Two), p. 140, and *Yearbook ... 1982*, vol. II (Part Two), pp. 36–37.

[923] See footnote 54 above, *Documents of the Conference*, p. 142, para. 211 (text of the Drafting Committee).

[924] The plural ("... when notice of it has been received by the other contracting States": see *Yearbook ... 1966*, vol. II, p. 209, document A/6309/Rev.1) was changed to the singular, which had the advantage of underlining that the time of becoming operative was specific to each of the parties (cf. the exposition by Yasseen, Chairman of the Conference Drafting Committee, in *Official Records ...*, footnote 923 above, 11th plenary meeting, p. 39, para. 11). On the final adoption of draft article 22 by the Commission, see *Yearbook ... 1965*, vol. I, p. 285, and *Yearbook ... 1966*, vol. I, p. 327.

[925] See paragraph (2) of the commentary to guideline 2.5.1.

[926] See paragraph (3) of the commentary to guideline 2.5.1.

[927] See paragraph (5) of the commentary to guideline 2.5.1.

(4) Following the adoption of this provision on first reading, three States reacted:[928] the United States of America, which welcomed it; and Israel and the United Kingdom of Great Britain and Northern Ireland, which were concerned about the difficulties that might be encountered by other States parties as a result of the suddenness of the effect of a withdrawal. Their arguments led the Special Rapporteur to propose the addition to draft article 22 of a paragraph (c) involving a complicated formulation whereby the withdrawal became operative as soon as the other States had received notice of it, but they were given three months' grace to make any necessary changes.[929] In this way, Sir Humphrey intended to give the other parties the opportunity to take the "requisite legislative or administrative action ..., where necessary", so that their internal law could be brought into line with the situation arising out of the withdrawal of the reservation.[930]

(5) As well as criticizing the overcomplicated formulation of the solution proposed by the Special Rapporteur, the members of the Commission were divided on the principle of the provision. Ruda, supported by Briggs, said that there was no reason to allow a period of grace in the case of withdrawal of reservations when no such provision existed in the case of the entry into force of a treaty as a result of the consent given by a State to be bound.[931] Other members, however, including Tunkin and Waldock himself, pointed out, with some reason, that the two situations were different: where ratification was concerned, "a State could obtain all the time it required by the simple process of delaying ratification until it had made the necessary adjustments to its municipal law"; in the case of the withdrawal of a reservation, by contrast, "the change in the situation did not depend on the will of the other State concerned, but on the will of the reserving State which decided" to withdraw it.[932]

(6) The Commission considered, however, that "such a clause would unduly complicate the situation and that, in practice, any difficulty that might arise would be obviated during the consultations in which the States concerned would undoubtedly engage".[933] The Commission nevertheless showed some hesitation in once again stipulating that the date on which the withdrawal became operative was that on which the other contracting States or organizations had been notified, because in its final commentary, after explaining that it had concluded that to formulate as a general rule the granting of a short period of time within which States could "adapt their internal law to the new situation [resulting from the withdrawal of the reservation] would be going too far", the Commission "felt that the matter should be left to be regulated by a specific provision in the treaty. It also considered that, even in the absence of such a provision, if a State required a short interval of time in which to bring its internal law into conformity with the situation resulting from the withdrawal of the reservation, good faith would debar the reserving State from complaining of the difficulty which its own reservation had occasioned".[934]

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[928] See the fourth report by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, pp. 55–56, document A/CN.4/177 and Add.1 and 2.

[929] "(c) On the date when the withdrawal becomes operative, article 21 ceases to apply, provided that, during a period of three months after that date a party may not be considered as having infringed the provision to which the reservation relates by reason only of its having failed to effect any necessary changes in its internal law or administrative practice."

[930] *Yearbook ... 1965*, vol. I, 800th meeting, 11 June 1965, p. 175, para. 47.

[931] *Ibid.*, p. 176, para. 59 (Ruda), and p. 177, para. 76 (Briggs).

[932] *Ibid.*, p. 176, paras. 68 and 69 (Tunkin); see also p. 175, para. 54 (Tsuruoka), and p. 177, paras. 78–80 (Waldock).

[933] Explanations given by Waldock, *ibid.*, 814th meeting, 29 June 1965, p. 273, para. 24.

[934] *Yearbook ... 1966*, vol. II, p. 209, commentary to draft article 20, document A/6309/Rev.1, para. 2.

(7) This raises another problem: by proceeding in this manner, the Commission surreptitiously reintroduced in the commentary the exception that Waldock had tried to incorporate in the actual text of what was to become article 22 of the Convention. Not only was such a manner of proceeding questionable, but the reference to the principle of good faith did not provide any clear guidance.[935]

(8) In the Commission's view, the question is nevertheless whether the Guide to Practice should include the clarification contained in the commentary of 1965: it makes sense to be more specific in this guide of recommended practices than in general conventions on the law of treaties. In this case, however, there are some serious objections to such inclusion: the "rule" set out in the commentary manifestly contradicts the one that appears in the Convention, and its inclusion in the Guide would therefore depart from that rule. That would be acceptable only if it was felt to meet a clear need, but this is not the case here. In 1965, Sir Humphrey Waldock had "heard of no actual difficulty arising in the application of a treaty from a State's withdrawal of its reservation";[936] this would still seem to be the case today. Consequently, it does not appear necessary or advisable to contradict or relax the rule stated in article 22, paragraph 3, of the Vienna Conventions.

(9) It is nonetheless true that, in certain cases, the effect of the withdrawal of a reservation immediately after notification is given might create problems. The 1965 commentary itself, however, gives the correct answer to the problem: in such a case, "the matter should ... be regulated by a specific provision of the treaty".[937] In other words, whenever a treaty relates to an issue, such as personal status or certain aspects of private international law, with regard to which it might be thought that the unexpected withdrawal of a reservation could cause the other parties difficulty because they had not adjusted their internal legislation, a clause should be included in the treaty specifying the period of time required to deal with the situation created by the withdrawal.

(10) This is, moreover, what happens in practice. A considerable number of treaties set a time limit longer than the one ordinarily given, which is reflected in article 22, paragraph 3 (a), of the Vienna Conventions, for the withdrawal of a reservation to take effect. This time limit generally ranges from one to three months, starting, in most cases, from the notification of the withdrawal to the depositary rather than to the other contracting States.[938] Conversely,

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[935] As the [International] Court [of Justice] has observed, the "principle of good faith is one of the basic principles governing the creation and performance of legal obligations", *Nuclear Tests, I.C.J. Reports 1974*, p. 268, para. 46; p. 473, para. 49; "it is not in itself a source of obligation where none would otherwise exist", *Border and Transborder Armed Actions (Nicaragua v. Honduras), Judgment, I.C.J. Reports 1988*, p. 105, para. 94.

[936] *Yearbook ... 1965*, vol. I, 814th meeting, 29 June 1965, p. 273, para. 24.

[937] See paragraph (6) above.

[938] See the examples, given by P.-H. Imbert, footnote 25 above, p. 390, or F. Horn, footnote 25 above, p. 438. See also, for example, the Convention on the Law Applicable to Succession to the Estates of Deceased Persons, adopted 1 August 1989 by the Hague Conference on Private International Law, art. 24, para. 3 (three months after notification of the withdrawal); the Convention concerning International Carriage by Rail of 9 May 1980, art. 12, para. 4 (one month after the depositary Government notifies the States of the withdrawal); the United Nations Convention on Contracts for the International Sale of Goods, of 11 April 1980, art. 97, para. 4 (six months); the Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention), of 23 June 1979, art. XIV, para. 2 (90 days from the transmission of the withdrawal to the parties by the depositary); and the International Convention on Travel Contracts of 23 April 1970, art. 40, para. 3 (three months after notification of withdrawal to the Belgian Government).

the treaty may set a shorter period than that contained in the Vienna Conventions. Thus, under the European Convention on Transfrontier Television, of 5 May 1989, article 32, paragraph 3:

> "Any contracting State which has made a reservation under paragraph 1 may wholly or partly withdraw it by means of a notification addressed to the Secretary-General of the Council of Europe. The withdrawal shall take effect *on the date of receipt of such notification by the Secretary-General*",

and not on the date of receipt by the other contracting parties of the notification by the depositary.[939] And sometimes a treaty stipulates that it is for the State which withdraws its reservation to specify the effective date of the withdrawal.[940]

(11) The purpose of these express clauses is to overcome the disadvantages of the principle established in article 22, paragraph 3 (a), of the Vienna Conventions, which is not above criticism. Apart from the problems considered above[941] arising, in some cases, from the fact that a withdrawal takes effect on receipt of its notification by the other parties, it has been pointed out that the paragraph does not "really resolve the question of the time factor",[942] for although, thanks to the specific provision introduced at the Vienna Conference in 1969,[943] the partners of a State or international organization that withdraws a reservation know the exact date on which the withdrawal has taken effect in their respect, the withdrawing State or international organization itself remains in uncertainty, for the notification may be received at completely different times by the other parties. This has the unfortunate effect of leaving the author of the withdrawal uncertain as to the date on which its new obligations will become operational.[944] Short of amending the text of article 22, paragraph 3 (a), itself, however, there is no way of overcoming this difficulty, which seems too insignificant in practice[945] to justify "revising" the Vienna text.

(12) It should, however, be noted in this connection that the rule laid down in this provision departs from ordinary law: normally, an action under a treaty takes effect from the date of its notification to the depositary. That is what articles 16, subparagraph (b), 24, paragraph 3, and 78, subparagraph (b),[946] of the 1969 Convention provide. And that is how the International Court of Justice ruled with regard to optional declarations of acceptance of its compulsory jurisdiction, following a line of reasoning that may, by analogy, be applied to the law of treaties.[947] The exception established by the provisions of article 22, paragraph 3 (a), of the

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[939] Emphasis added. Council of Europe conventions containing clauses on the withdrawal of reservations generally follow this formula: cf. the 1963 Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, art. 8, para. 2; the 1977 European Agreement on the Transmission of Applications for Legal Aid, art. 13, para. 2; or the 1997 European Convention on Nationality, art. 29, para. 3.

[940] Cf. the International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention (Revised)) of 18 May 1973, art. 12, para. 2: "... Any Contracting Party which has entered reservations may withdraw them, in whole or in part, at any time by notification to the depositary specifying the date on which such withdrawal takes effect."

[941] Paras. (4) to (9).

[942] P.-H. Imbert, footnote 25 above, p. 290.

[943] See footnote 924 above.

[944] In this connection, see the comments by Briggs, *Yearbook ... 1965*, vol. I, 800th meeting, 14 June 1965, p. 177, para. 75, and 814th meeting, 29 June 1965, p. 273, para. 25.

[945] See paragraph (8) above.

[946] Art. 79 (b) of the 1986 Convention.

[947] "By the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriving from article 36. (...) For it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States

Vienna Conventions is explained by the concern to avoid a situation in which the other contracting States or contracting organizations to a treaty to which a State withdraws its reservation find themselves held responsible for not having observed the treaty provisions with regard to that State, even though they were unaware of the withdrawal.[948] This concern is to be commended.

(13) The Commission has sometimes criticized the inclusion of the phrase "unless the treaty otherwise provides"[949] in some provisions of the Vienna Conventions. In some circumstances, however, it is valuable in that it draws attention to the advisability of possibly incorporating specific reservation clauses in the actual treaty in order to obviate the disadvantages associated with the application of the general rule or the ambiguity resulting from silence.[950] This is the case with regard to the time at which the withdrawal of a reservation becomes operative, which it is certainly preferable to specify whenever the application of the principle set forth in article 22, paragraph 3 (a), of the Vienna Conventions and also contained in guideline 2.5.8 might give rise to difficulties, either because the relative suddenness with which the withdrawal takes effect might put the other parties in an awkward position or, conversely, because there is a desire to neutralize the length of time elapsing before notification of withdrawal is received by them.

2.5.9 Cases in which the author of a reservation may set the effective date of withdrawal of the reservation

The withdrawal of a reservation becomes operative on the date set by the State or international organization which withdraws the reservation, where:

(a) that date is later than the date on which the other contracting States or contracting organizations received notification of it; or

(b) the withdrawal does not add to the rights of the withdrawing State or international organization, in relation to the other contracting States or contracting organizations.

Commentary

(1) Guideline 2.5.9 specifies the cases in which article 22, paragraph 3 (a), of the Vienna Conventions does not apply, not because there is an exemption to it but because it is not designed for that purpose. Regardless of the situations in which an express clause of the treaty rules out the application of the principle embodied in this provision, this applies in the two above-mentioned cases, where the author of the reservation can unilaterally set the effective date of its withdrawal.

(2) The first subparagraph of guideline 2.5.9 considers the case in which the author of a reservation sets that date at a time later than that resulting from the application of article 22,

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concerned." Judgment of 26 November 1957, *Right of Passage over Indian Territory (Preliminary Objections)*, *I.C.J. Reports 1957*, p. 146; see also *I.C.J. Reports 1998*, p. 291, para. 25; or *I.C.J. Judgment* of 11 June 1998, *Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections)*, *I.C.J. Reports 1988*, p. 293, para. 30.

[948] See the Commission's commentary to article 22, adopted on first reading, *Yearbook ... 1962*, vol. II, pp. 181–182, and to article 22, adopted on second reading, *Yearbook ... 1966*, vol. II, p. 209.

[949] See, for example, paragraph (15) of the commentary to guideline 2.5.1.

[950] See, for example, guidelines 2.3 and 2.3.1.

paragraph 3 (a). This does not pose any particular problems: the period provided for in this provision is intended to enable the other parties not to be caught unawares and to be fully informed of the scope of their commitments in relation to the State (or international organization) renouncing its reservation. From such time as that information is effective and available, therefore, there is no reason why the author of the reservation should not set the effective date of the reservation's withdrawal as it wishes, since, in any case, it could have deferred the date by notifying the depositary of the withdrawal at a later time.

(3) Subparagraph (a) of guideline 2.5.9 deliberately uses the plural ("the other contracting States or contracting organizations") where article 22, paragraph 3 (a), uses the singular ("that State or that organization"). For the withdrawal to take effect on the date specified by the withdrawing State, it is essential that all the other contracting States and contracting organizations should have received notification, otherwise neither the spirit nor the *raison d'être* of article 22, paragraph 3 (a), would have been respected.

(4) Subparagraph (b) concerns cases in which the date set by the author of the reservation is prior to the receipt of notification by the other contracting States or contracting organizations. In this situation, only the withdrawing State or international organization (and, where relevant, the depositary) knows that the reservation has been withdrawn. This is particularly the case where the withdrawal is assumed to be retroactive, as sometimes occurs.[951]

(5) In the absence of a specific treaty provision, an intention expressed unilaterally by the reserving State cannot, in theory, prevail over the clear provisions of article 22, paragraph 3 (a), if the other contracting States or international organizations object. The Commission believes, however, that it is not worth making an exception of the category of treaties establishing "integral obligations", especially in the field of human rights; in such a situation, there can be no objection — quite the contrary — to the fact that the withdrawal takes immediate, even retroactive, effect if the State making the original reservation so wishes, since the legislation of other States is, by definition, not affected.[952] In practice, this is the kind of situation in which retroactive withdrawals have occurred.[953]

(6) One may ask whether it is preferable to view the question from the angle of the withdrawing State or from that of the other parties, in which case subparagraph (b) ought to have been worded "... the withdrawal does not add to the obligations of the other contracting States or international organizations". In fact, these are two sides of the same coin; nevertheless, the first solution is more consistent with the active role of the State that decides to withdraw its reservation.

2.5.10 Partial withdrawal of reservations

1. The partial withdrawal of a reservation limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, in the relations between the withdrawing State or international organization and the other parties to the treaty.

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[951] See the example given by P.-H. Imbert, footnote 25 above, p. 291 (withdrawal of reservations by Denmark, Norway and Sweden to the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons: see *Multilateral Treaties ...*, chap. V.2–3).

[952] In this connection, see P.-H. Imbert, footnote 25 above, pp. 290–291.

[953] See footnote 951 above.

2. The partial withdrawal of a reservation is subject to the same rules on form and procedure as a total withdrawal and becomes operative on the same conditions.

Commentary

(1) The prevailing view among legal scholars holds that, "[s]ince a reservation can be withdrawn, it is possible also to modify or even replace a reservation, provided the result is to restrict its effect".[954] While this principle is formulated in cautious terms, it is hardly debatable and can be stated more categorically: nothing prevents the modification of a reservation if the modification reduces the scope of the reservation and amounts to a partial withdrawal. This is the point of departure of guideline 2.5.10.

(2) Clearly, this does not raise the slightest problem when such a modification is expressly provided for by the treaty. While this is relatively rare, there are reservation clauses to this effect. For example, article 23, paragraph 2, of the Convention on the Contract for the International Carriage of Passengers and Luggage by Inland Waterway (CVN) of 6 February 1976 provides that:

> "The declaration provided for in paragraph 1 of this article may be made, withdrawn or modified at any later date; in such case, the declaration, withdrawal or modification shall take effect as from the ninetieth day after receipt of the notice by the Secretary-General of the United Nations."

(3) In addition, reservation clauses expressly contemplating the total or partial withdrawal of reservations are to be found more frequently. For example, article 8, paragraph 3, of the Convention on the Nationality of Married Women of 20 February 1957 provides that:

> "Any State making a reservation in accordance with paragraph 1 of the present article may at any time withdraw the reservation, in whole or in part, after it has been accepted, by a notification to this effect addressed to the Secretary-General of the United Nations. Such notification shall take effect on the date on which it is received."[955]

The same applies to article 17, paragraph 2, of the Council of Europe Convention on the Protection of the Environment Through Criminal Law of 4 November 1998, which reads as follows:

> "Any State which has made a reservation ... may wholly or partly withdraw it by means of a notification addressed to the Secretary-General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary-General."[956]

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[954] A. Aust, footnote 155 above, p. 156. See also P.-H. Imbert, footnote 25 above, p. 293, or J. Polakiewicz, footnote 638 above, p. 96.

[955] See also, for example, article 50, paragraph 4, of the Single Convention on Narcotic Drugs of 1961, as amended in 1975: "A State which has made reservations may at any time by notification in writing withdraw all or part of its reservations."

[956] See also, for example, article 13, paragraph 2, of the European Convention on the Suppression of Terrorism of 27 January 1977: "Any State may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary-General of the Council of Europe which shall become effective as from the date of its receipt." For other examples of conventions concluded under the auspices of the Council of Europe and containing a comparable clause, see the commentary to guideline 2.5.2, footnote 842 above.

In addition, under article 15, paragraph 2, of the Convention on the fight against corruption involving officials of the European Communities or officials of States members of the European Union, of 26 May 1997:

> "Any Member State which has entered a reservation may withdraw it at any time in whole or in part by notifying the depositary. Withdrawal shall take effect on the date on which the depositary receives the notification."

(4) The fact that partial or total withdrawal are mentioned simultaneously in numerous treaty clauses highlights the close relationship between them. This relationship, confirmed in practice, is, however, sometimes contested in the literature.

(5) During the preparation of the draft articles on the law of treaties by the International Law Commission, Sir Humphrey Waldock suggested the adoption of a draft article placing the total and partial withdrawal of reservations on an equal footing.[957] Following the consideration of this draft by the Drafting Committee, it returned to the plenary stripped of any reference to the possibility of withdrawing a reservation "in part",[958] although no reason for this modification can be inferred from the summaries of the discussions. The most plausible explanation is that this seemed to be self-evident — "he who can do more can do less" — and the word "withdrawal" should very likely be interpreted, given the somewhat surprising silence of the commentary, as meaning "total or partial withdrawal".

(6) The fact remains that this is not entirely self-evident and that practice and the literature[959] appear to be somewhat undecided. In practice, one can cite a number of reservations to conventions concluded within the framework of the Council of Europe which were modified without arousing opposition.[960] For its part, the European Commission of Human Rights "showed a certain flexibility" as to the time requirement set out in article 64 of the European Convention on Human Rights:[961] "As internal law is subject to modification from time to time, the Commission considered that a modification of the law protected by the reservation, even if it entails a modification of the reservation, does not undermine the time requirement of article 64. According to the Commission, despite the explicit terms of article 64, "... to the extent that a law *then in force* in its territory is not in conformity ... the reservation signed by Austria on 3 September 1958 (1958–1959) (2 *Annuaire* 88–91) covers ... the law of 5 July 1962, which did not have the result of enlarging, *a posteriori*, the area removed from the control of the Commission."[962]

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[957] Cf. draft art. 17, para. 6, in Sir Humphrey's first report, *Yearbook ... 1962*, vol. II, p. 69, para. 69.

[958] *Ibid.*, p. 201; on the changes made by the Drafting Committee to the draft prepared by the Special Rapporteur, see paragraph (3) of the commentary to guideline 2.5.1.

[959] Cf. P.-H. Imbert, footnote 25 above, p. 293.

[960] J. Polakiewicz, footnote 638 above, p. 95; admittedly, it seems to be more a matter of "statements concerning modalities of implementation of a treaty at the internal level" within the meaning of guideline 1.5.2 than of reservations as such.

[961] Article 57 since the entry into force of Protocol II: "1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article. 2. Any reservation made under this Article shall contain a brief statement of the law concerned."

[962] W.A. Schabas, commentary on article 64 footnote 137 above, p. 932; italics in text; footnotes omitted. See the reports of the Commission in the cases of *Association X c. Autriche* (req. No. 473/59), *Ann.* 2, p. 405, or *X c. Autriche* (req. No. 88180/78), *DR* 20, pp. 23–25.

(7) This latter clarification is essential and undoubtedly provides the key to this jurisprudence: it is *because* the new law *does not enlarge* the scope of the reservation that the Commission considered that it was covered by the law.[963] Technically, what is at issue is not a modification of the reservation itself but the effect of the modification of the internal law; nevertheless, it seems legitimate to make the same argument. Moreover, in some cases, States formally modified their reservations to the European Convention on Human Rights (in the sense of diminishing their scope) without protest from the other parties.[964]

(8) The case law of the European Court of Human Rights can be interpreted in the same way in that, while the Strasbourg Court refuses to extend to new, more restrictive laws benefit of a reservation made upon ratification, it proceeds differently if, following ratification, the law "goes no farther than a law in force on the date of the said reservation".[965] The outcome of the *Belilos* case is, however, likely to raise doubts in this regard.

(9) Following the position taken by the Strasbourg Court concerning the follow-up to its finding that the Swiss "declaration" made in 1974, relating to article 6, paragraph 1, of the European Convention on Human Rights, was invalid,[966] Switzerland not without hesitation,[967] first modified its "declaration" — equated by the Court with a reservation, at least insofar as the applicable rules are concerned — so as to render it compatible with the judgment of 29 April 1988.[968] The "interpretative declaration" thus modified was notified by Switzerland to the Secretary-General of the Council of Europe, the depositary of the Convention, and to the Committee of Ministers "acting as a monitoring body for the enforcement of judgements of the Court".[969] These notifications do not seem to have given rise to any disputes or posed any problems for the Convention bodies or other States parties.[970] However, the situation in the Swiss courts was different. In a decision dated 17 December 1992, *Elisabeth B. v. Council of State of Thurgau Canton*, the Swiss Federal Court decided, with regard to the grounds for the *Belilos* decision, that it was the entire "interpretative declaration" of 1974 that was invalid and that there was thus no validly formulated reservation to be amended 12 years later; if anything, it would have been a new reservation, which was incompatible with the *ratione temporis* condition for the formulation

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[963] Cf. the partially dissenting opinion of Judge Valticos in the *Chorherr c. Autriche* case: "If the law is modified, the divergence to which the reservation refers could probably, if we are not strict, be maintained in the new text, but it could not, of course, be strengthened" (Judgement of 25 August 1993, series A, No. 266-B, p. 40).

[964] Cf. the successive partial withdrawals by Finland of its reservation to article 5 in 1996, 1998, 1999 and 2001 (available at http://conventions.coe.int/).

[965] Judgement of 25 February 1982, *Campbell et Cosans*, series A, vol. 48, p. 17, para. 37.

[966] The Court held that "the contentious declaration does not meet two requirements of article 64 of the Convention (see footnote 961 above), so that it must be deemed invalid" (series A, vol. 132, para. 60) and that, since "there is no doubt that Switzerland considers itself bound by the Convention, independently of the validity of the declaration". The Convention should be applied to Switzerland irrespective of the declaration (*ibid.*).

[967] I. Cameron and F. Horn, footnote 205 above, pp. 69–129.

[968] Believing that the Court's rebuke dealt only with the "penal aspect", Switzerland had limited its "declaration" to civil proceedings.

[969] J.-F. Flauss, footnote 673 above, p. 301; see also William Schabas, "Reservations to Human Rights Treaties: Time for Innovation and Reform", *Annuaire canadien de droit international* 1985, p. 48. For references to these notifications, see Council of Europe, *Série des traités européennes* (STE), No. 5, pp. 16–17, and Committee Resolution DH (89) 24 (Annexe), dated 19 September 1989.

[970] Some authors have, however, contested their validity; see G. Cohen-Jonathan, footnote 727 above, p. 314, and the works cited in the judgment (footnote 972 below) of the Swiss Federal Court, of 17 December 1992 (para. 6.b), and by J.-F. Flauss, footnote 673 above, p. 300.

of reservations established in article 64 of the Rome Convention[971] and in article 19 of the 1969 Vienna Convention.[972] On 29 August 2000, Switzerland officially withdrew its "interpretative declaration" concerning article 6 of the European Convention on Human Rights.

(10) Despite appearances, however, it cannot be inferred from this important decision that the fact that a treaty body with a regulatory function (human rights or other) invalidates a reservation prohibits any change in the challenged reservation:

- The Swiss Federal Court's position is based on the idea that, in this case, the 1974 "declaration" was invalid in its entirety (even if it had not been explicitly invalidated by the European Court of Human Rights); and, above all:
- In that same decision, the Court stated that:

  "While the 1988 declaration merely constitutes an explanation of and restriction on the 1974 reservation, there is no reason why this procedure should not be followed. While neither article 64 of the European Convention on Human Rights nor the 1969 Vienna Convention on the Law of Treaties (RS 0.111) explicitly settles this issue, it would appear that, as a rule, the reformulation of an existing reservation should be possible if its purpose is to attenuate an existing reservation. This procedure does not limit the relevant State's commitment vis-à-vis other States; rather, it increases it in accordance with the Convention."[973]

(11) This is an excellent presentation of both the applicable law and its basic underlying premise: there is no valid reason for preventing a State from *limiting* the scope of a previous reservation by withdrawing it, if only in part; the treaty's integrity is better ensured thereby, and it is not impossible that, as a consequence, some of the other parties may withdraw objections that they had made to the initial reservation.[974] Furthermore, as has been pointed out, without this option, the equality between parties would be disrupted (at least in cases where a treaty monitoring body exists): "States which have long been parties to the Convention might consider themselves to be subject to unequal treatment by comparison with States which ratified the Convention [more recently] and, a fortiori, with future contracting parties"[975] that would have the advantage of knowing the treaty body's position with regard to the validity of reservations comparable to the one that they might be planning to formulate and of being able to modify it accordingly.

(12) Moreover, it was such considerations[976] that led the Commission to state in its preliminary conclusions of 1997 that when a State takes action to address the impermissibility of a reservation, such action "may consist, for example, in the State's ... modifying its reservation to eliminate the inadmissibility ...";[977] obviously, this is possible only if it has the option of modifying the reservation by partially withdrawing it.

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[971] See footnote 961 above.

[972] Extensive portions of the Federal Court's decision are cited in French translation in the *Journal des Tribunaux*, vol. I: *Droit fédéral*, 1995, p. 537. The relevant passages are to be found in paragraph 7 of the decision (pp. 533–537).

[973] See the decision mentioned in footnote 972 above, p. 535.

[974] See F. Horn, footnote 25 above, p. 223.

[975] See J.-F. Flauss, footnote 673 above, p. 299.

[976] See report of the Commission on the work of its forty-ninth session, *Yearbook ... 1997*, vol. II, Part Two, p. 49, para. 86, and p. 55, paras. 141–144.

[977] See the preliminary conclusions, *Yearbook ... 1997*, vol. II, Part Two, p. 57, para. 10. See also guideline 4.5.3.

(13) In practice, partial withdrawals are far from non-existent. In 1988, Horn noted that, of 1,522 reservations or interpretative declarations made in respect of treaties of which the Secretary-General of the United Nations is the depositary, "47 have been withdrawn completely or partly ...[978] In the majority of cases, i.e., 30 statements, the withdrawals have been partial. Of these, six have experienced successive withdrawals leading in only two cases to a complete withdrawal".[979] This trend, while not precipitous, has since shown no signs of slowing down. To cite merely a few recent examples:

- On 25 February 2011, the Government of the Commonwealth of the Bahamas notified the Secretary-General of its decision to withdraw its reservation to article 16, paragraph 1 (h), of the Convention on the Elimination of All Forms of Discrimination against Women;[980]
- On 13 December 2010, Thailand partially withdrew its reservation to article 7 of the Convention on the Rights of the Child;[981]
- On 5 July 1995, following several objections, the Libyan Arab Jamahiriya modified the general reservation that it had made upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979, making it more specific;[982]
- On 11 November 1988, Sweden partially withdrew its reservation to article 9, paragraph 2, of the Convention on the Recovery Abroad of Maintenance of 20 June 1956;[983]
- On two occasions, in 1986 and 1995, Sweden also withdrew, in whole or in part, some of its reservations to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 26 October 1961.[984]

In all these cases, which provide only a few examples, the Secretary-General, as depositary of the conventions in question, took note of the modification without any comment whatsoever.

(14) The Secretary-General's practice is not absolutely consistent, however, and in some cases even those involving modifications which apparently reduce the scope of the reservations in question, he proceeds as in the case of late formulation of reservations[985] and confines himself, "in keeping with the ... practice followed in similar cases", to receiving "the declarations in question for deposit in the absence of any objection on the part of any of the

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[978] Of these 47 withdrawals, 11 occurred during a succession of States. There is no question that a successor State may withdraw reservations made by its predecessor, in whole or in part (cf. art. 20 of the 1978 Vienna Convention on Succession of States in respect of Treaties); however, as the Commission has decided (see *Yearbook ... 1995*, vol. II, Part Two, p. 107, para. 477 and *Yearbook ... 1997*, vol. II, Part Two, p. 68, para. 221) all problems concerning reservations related to the succession of States are the subject of Part 5 of the Guide to Practice.

[979] F. Horn, footnote 25 above, p. 226. These figures are an interesting indication but should be viewed with caution.

[980] *Multilateral Treaties ...*, chap. IV.8.

[981] *Ibid.*, chap. IV.11.

[982] *Ibid.*, chap. IV.8.

[983] *Ibid.*, chap. XX.1; see also Sweden's 1996 "reformulation" of one of its reservations to the 1951 Convention relating to the Status of Refugees and its simultaneous withdrawal of several other reservations (*ibid.*, chap.V.2) and the partial, then total (in 1963 and 1980, respectively) withdrawal of a Swiss reservation to that Convention (*ibid.*).

[984] *Ibid.*, chap. XIV.3; see also Finland's modification of 10 February 1994 reducing the scope of a reservation to the same Convention (*ibid.*).

[985] See paragraphs (11) to (13) of the commentary to guideline 2.3.

contracting States, either to the deposit itself or to the procedure envisaged".[986] This practice is defended in the following words in the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*: "when States have wished to substitute new reservations for initial reservations made at the time of deposit ... this has amounted to a withdrawal of the initial reservations — which raised no difficulty — and the making of (new) reservations".[987] This position seems to be confirmed by a memorandum dated 4 April 2000 from the United Nations Legal Counsel, which describes "the practice followed by the Secretary-General as depositary in respect of communications from States which seek to modify their existing reservations to multilateral treaties deposited with the Secretary-General or which may be understood to seek to do so" and extends the length of time during which parties may object from 90 days to twelve months.[988]

(15) Not only is this position contrary to what appears to be the accepted practice when the proposed modification limits the scope of the modified reservation; it is more qualified than initially appears. The note verbale of 4 April 2000 must be read together with the Legal Counsel's reply of the same date to a note verbale from Portugal on behalf of the European Union reporting problems associated with the 90-day time period. In that note a distinction is made between "a modification of an existing reservation" and "a partial withdrawal thereof". In the case of the second type of communication, "the Legal Counsel shares the concerns expressed by the Permanent Representative that it is highly desirable that, as far as possible, communications which are no more than partial withdrawals of reservations should not be subjected to the procedure that is appropriate for modifications of reservations".

(16) The question is thus merely one of wording: the Secretary-General refers to withdrawals which enlarge the scope of reservations as "modifications" and to those which reduce that scope as "partial withdrawals"; the latter are not (or should not be, although this is not always translated into practice) subject to the cumbersome procedure required for the late formulation of reservations.[989] To require a one-year time period before the *limitation* of a reservation can produce effects, subjecting it to the risk of a "veto" by a single other party, would obviously be counterproductive and in violation of the principle that, to the extent possible, the treaty's integrity should be preserved.

(17) Despite some elements of uncertainty, the result of the foregoing considerations is that the modification of a reservation whose effect is to reduce its scope must be subject to the same legal regime as a total withdrawal. In order to avoid any ambiguity, especially in view of the terminology used by the Secretary-General of the United Nations,[990] it is better to refer here to a "partial withdrawal".

(18) The second paragraph of guideline 2.5.10 takes account of the alignment of the rules on partial withdrawal of reservations with those that apply in the case of a total withdrawal. Thus,

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[986] Cf., for example, the procedure followed in the case of Azerbaijan's undeniably limiting modification of 28 September 2000 (in response to the comments of States which had objected to its initial reservation) of its reservation to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (*Multilateral Treaties* ..., chap. IV.12).

[987] Document prepared by the Treaty Section of the Office of Legal Affairs, footnote 75 above, para. 206.

[988] Memorandum from the United Nations Legal Counsel addressed to the Permanent Representatives of States Members of the United Nations (LA41TR/221 (23-1)). For further information on this time period, see paragraphs (8) and (9) of the commentary to guideline 2.3.1.

[989] See guidelines 2.3 to 2.3.2.

[990] See paragraphs (14) to (16) above.

it implicitly refers to guidelines 2.5.1, 2.5.2, 2.5.5, 2.5.6 and 2.5.8, which fully apply to partial withdrawals. The same is not true, however, for guideline 2.5.7, on the effect of a total withdrawal.[991]

(19) To avoid any confusion, the Commission also deemed it useful to set out in the first paragraph the definition of what constitutes a partial withdrawal. The definition draws on the actual definition of reservations found in article 2, subparagraph (d), of the 1969 and 1986 Vienna Conventions and in guideline 1.1.

(20) It is not, however, aligned with that guideline: whereas a reservation is defined "subjectively" by the objective pursued by the author (as reflected by the expression "purports to ..." in those provisions), partial withdrawal is defined "objectively" by the effects that it produces. The explanation for the difference lies in the fact that, while a reservation produces an effect only if it is accepted (expressly or implicitly),[992] withdrawal, whether total or partial, produces its effects and "the consent of a State or international organization which has accepted the reservation is not required";[993] nor indeed is any additional formality. This effect is mentioned in the first paragraph of guideline 2.5.10 (partial withdrawal "limits the legal effect of the reservation and ensures more completely the application of the provisions of the treaty, or the treaty as a whole") and explained in guideline 2.5.11.

2.5.11 Effect of a partial withdrawal of a reservation

1. The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent provided by the new formulation of the reservation. An objection formulated to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.

2. No new objection may be formulated to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect.

Commentary

(1) While the form and procedure of a partial withdrawal must definitely be aligned with those of a pure and simple withdrawal,[994] the problem also arises as to whether the provisions of guideline 2.5.7 ("Effects of withdrawal of a reservation") can be transposed to partial withdrawals. In fact, there can be no hesitation: a partial withdrawal of a partial reservation cannot be compared to that of a total withdrawal, nor can it be held that "the *partial* withdrawal of a reservation entails the *full* application of the provisions to which the reservation relates in the relations between the State or international organization which *partially* withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it".[995] Of course, the treaty may be implemented to a greater extent in the relations between the reserving State or international organization and the other contracting States or contracting organizations, but not "fully" since, hypothetically, the reservation (in a more limited form, admittedly) remains.

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[991] See guideline 2.5.11 and paragraph (1) of commentary thereto.

[992] See article 20 of the Vienna Conventions and guideline 4.1.

[993] See guideline 2.5.1.

[994] See paragraph (18) of the commentary to guideline 2.5.10.

[995] See guideline 2.5.7.

(2) Yet, while partial withdrawal of a reservation does not constitute a new reservation,[996] it nonetheless leads to a modification of the previous text. Thus, as the first sentence of guideline 2.5.11 specifies, the legal effect of the reservation is modified "to the extent provided by the new formulation of the reservation". This wording is based on the terminology used in article 21 of the Vienna Conventions[997] without entering into a substantive discussion of the effects of reservations and objections thereto.

(3) Another specific problem arises in the case of partial withdrawal. In the case of total withdrawal, the effect is to deprive of consequences the objections that had been made to the reservation as initially formulated,[998] even if those objections had been accompanied by opposition to the entry into force of the treaty with the author of the reservation.[999] There is no reason for this to be true in the case of a partial withdrawal. Admittedly, States or international organizations that had made objections would be well advised to reconsider them and withdraw them if the motive or motives that gave rise to them were eliminated by the modification of the reservation, and they may certainly proceed to withdraw them,[1000] but they cannot be required to do so, and they may perfectly well maintain their objections if they deem it appropriate, on the understanding that the objection has been expressly justified by the part of the reservation that has been withdrawn. In the latter case, the objection disappears, which is what is meant by the phrase "insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn". Two questions nonetheless arise in this connection.

(4) The first is to know whether the authors of an objection not of this nature must formally confirm it or whether it must be understood to apply to the reservation in its new formulation. In the light of practice, there is scarcely any doubt that this assumption of continuity is essential, and the Secretary-General of the United Nations, as depositary, seems to consider that the continuity of the objection goes without saying.[1001] This seems fairly reasonable, for the partial withdrawal does not eliminate the initial reservation and does not constitute a new reservation; *a priori*, the objections that were made to it rightly continue to apply so long as their authors do not withdraw them. The second sentence of guideline 2.5.11, paragraph 1, draws the necessary consequences.

(5) The second question that arises is whether partial withdrawal of the reservation can, conversely, constitute a new opportunity to object to the reservation resulting from the partial withdrawal. Since it is not a new reservation but an attenuated form of the existing reservation, reformulated so as to bring the reserving State's commitments more fully into line with those provided for in the treaty, it might, *prima facie*, seem somewhat doubtful that the other contracting States and contracting organizations could object to the new

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[996] See paragraph (15) of the commentary to guideline 2.5.10.

[997] See article 21, paragraph 1: "A reservation established with regard to any party in accordance with articles 19, 20 and 23: (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation."

[998] See paragraph 1 of guideline 2.5.7 ("… whether they had accepted the reservation or objected to it").

[999] See paragraph 2 of guideline 2.5.7.

[1000] See paragraph (11) of the commentary to guideline 2.5.10, and footnote 974 above; see also guideline 2.7.1.

[1001] The objections of Denmark, Finland, Mexico, Netherlands, Norway or Sweden to the reservation formulated by the Libyan Arab Jamahiriya to the 1979 Convention on the Elimination of All Forms of Discrimination against Women (see the commentary to guideline 2.5.10, footnote 982 above) were not modified following the reformulation of the reservation and are still listed in *Multilateral Treaties …*, chap. IV.8.

formulation:[1002] if they have adapted to the initial reservation, it is difficult to see how they can go against the new one, which, in theory, has attenuated effects. In principle, therefore, a State cannot object to a partial withdrawal any more than it can object to a withdrawal pure and simple.

(6) There is nevertheless an exception to this principle. While there seems to be no example, a partial withdrawal might have a discriminatory effect. Such would be the case if, for instance, a State or an international organization renounced a previous reservation except *vis-à-vis* certain parties or categories of parties or certain categories of beneficiaries to the exclusion of others. In those cases, it would seem necessary for those parties to be able to object to the reservation even though they had not objected to the initial reservation when it applied to all of the contracting States and contracting organizations together. The second paragraph of guideline 2.5.11 sets out both the principle that it is impossible to object to a reservation in the event of a partial withdrawal and the exception when the withdrawal is discriminatory.

2.5.12 Withdrawal of interpretative declarations

An interpretative declaration may be withdrawn at any time by an authority considered as representing the State or international organization for that purpose, following the same procedure applicable to its formulation.

Commentary

(1) It follows from guideline 2.4.4 that, except where a treaty provides otherwise,[1003] a "simple" interpretative declaration "may be formulated at any time". It may, of course, be inferred therefrom that such a declaration may also be withdrawn at any time without any special procedure. It would, moreover, be paradoxical if the possibility of the withdrawal of an interpretative declaration was more limited than that of the withdrawal of a reservation, which can be done "at any time".[1004]

(2) While States seldom withdraw their interpretative declarations, this does happen occasionally. On 1 March 1990, for instance, the Government of Italy notified the Secretary-General that "it had decided to withdraw the declaration by which the provisions of articles 17 and 18 [of the Geneva Convention of 28 July 1951 relating to the Status of Refugees] were recognized by it as recommendations only".[1005] Likewise, "on 20 April 2001, the Government of Finland informed the Secretary-General [of the United Nations] that it had decided to withdraw its declaration in respect of article 7, paragraph 2, made upon

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[1002] Whereas they can certainly remove their initial objections, which, like reservations themselves, can be withdrawn at any time (see article 22, paragraph 2, of the 1969 and 1986 Vienna Conventions); see paragraph (11) of the commentary to guideline 2.5.10.

[1003] Cf. guideline 2.4.7.

[1004] Cf. article 22, paragraph 1, of the 1969 and 1986 Vienna Conventions and guideline 2.5.1.

[1005] *Multilateral Treaties* ..., chap. V.2. It should be noted that doubts persist as to the nature of this declaration. There are also withdrawals of "statements of non-recognition" (cf., for example, the withdrawal of the Egyptian declarations in respect of Israel concerning the 1966 International Convention on the Elimination of All Forms of Racial Discrimination or the Single Convention on Narcotic Drugs, following the Camp David Agreement in 1980, *ibid.*, chap. IV.2 or chap. VI.15), but such statements are "outside the scope of the ... Guide to Practice" (see guideline 1.5.1).

ratification" of the 1969 Vienna Convention on the Law of Treaties (ratified by that country in 1977).[1006]

(3) This practice is compatible with the very informal nature of interpretative declarations.

(4) The withdrawal of an interpretative declaration must nevertheless be based on the few procedures provided for in guidelines 2.4.2 and 2.4.5 with regard to the authorities which are competent to formulate such a declaration (and which are the same as those which may represent a State or an international organization for the adoption or authentication of the text of the treaty or for expressing their consent to be bound). The wording used in guideline 2.5.12 implicitly refers to those provisions.

2.6 Formulation of objections

2.6.1 Definition of objections to reservations

"Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation formulated by another State or international organization, whereby the former State or organization purports to preclude the reservation from having its intended effects or otherwise opposes the reservation.

Commentary

(1) The aim of guideline 2.6.1 is to provide a generic definition applicable to all the categories of objections to reservations provided for in the 1969 and 1986 Vienna Conventions. For this purpose, the Commission has taken as a model the definition of reservations provided in article 2, paragraph 1 (d), of the Vienna Conventions and reproduced in guideline 1.1 of the Guide to Practice, adapting it to objections.

(2) The definition of reservations contains five elements:

- The first concerns the nature of the act ("a unilateral statement");
- The second concerns its designation ("however phrased or named");
- The third concerns its author ("made by a State or an international organization");
- The fourth concerns when it should be made (when expressing consent to be bound[1007]); and
- The fifth concerns its content or object, defined in relation to the objective pursued by the author of the reservation ("whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or international organization"[1008]).

(3) However, the definition of objections need not include all these elements, some of which are specific to reservations and some of which deserve to be further clarified for the purposes of the definition of objections.

[1006] *Ibid.*, chap. XXIII.1. The declaration concerned the respective powers of the President of the Republic, the Head of Government and the Minister for Foreign Affairs to conclude treaties. See also the withdrawal by New Zealand of a declaration made upon ratification of the Agreement establishing the Asian Development Bank (*ibid.*, chap. X.4).

[1007] See guideline 1.1.

[1008] *Ibid.*

(4) It appeared to the Commission in particular that it would be better not to mention the time at which an objection can be formulated; the matter is not clearly resolved in the Vienna Conventions, and it is preferable to consider it separately and endeavour to respond to it in a separate guideline.[1009]

(5) Conversely, two of the elements in the definition of reservations must without any doubt appear in the definition of objections, which, like reservations, are unilateral statements whose wording or designation is unimportant if their object makes it possible to characterize them as objections.

(6) With regard to the first element, the provisions of the Vienna Conventions leave not the slightest doubt: an objection emanates from *a* State or *an* international organization and can be withdrawn at any time.[1010] However, this does not resolve the question of which categories of States or international organizations can formulate an objection.

(7) At this point, it is not necessary to include in the definition the detail found in article 20, paragraph 4 (b), of the Vienna Convention of 1986, which refers to a "*contracting* State" and a "*contracting* international organization".[1011] There are two reasons for this:

- On the one hand, article 20, paragraph 4 (b), settles the question of whether an objection has *effects* on the entry into force of the treaty between the author of the reservation and the author of the objection; however, it leaves open the question of whether it is possible for a State or an international organization that is not a contracting State or organization in the meaning of article 2, paragraph 1 (f), of the Convention to make an objection; the possibility that such a State or organization might formulate an objection cannot be ruled out, it being understood that the objection would not produce the effect provided for in article 20, paragraph 4 (b), until the author became a contracting State or contracting organization. Moreover, article 21, paragraph 3, does not reproduce this detail but refers only to "a State or an international organization objecting to a reservation" without further elaboration; this aspect deserves to be studied separately;
- On the other hand, the definition of reservations itself gives no information as to the status of a State or an international organization that is empowered to formulate a reservation; it does not therefore seem helpful to make the definition of objections more cumbersome by proceeding differently.

(8) With regard to the second element, it is sufficient to recall that the law on reservations to treaties, as embodied in the 1969 Vienna Convention, is permeated by the notion that the intentions of States take precedence over the terminology that they use to express them. According to the definition given in the Convention, the "term"[1012] "treaty", which "means an international agreement ... whatever its particular designation".[1013] Likewise, a reservation

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[1009] See guideline 2.6.12 and its commentary.

[1010] Cf. article 20, para. 4 (b), article 21, para. 3, and article 22, paras. 2 and 3 (b). On this subject, see: R. Baratta, footnote 701 above, p. 341, or Renata Szafarz, footnote 27 above, p. 313. It does not follow, however, that, like a reservation, an objection cannot be formulated jointly by several States or international organizations. See guideline 2.6.4 below.

[1011] Article 20, paragraph 4 (b), of the Vienna Convention of 1969 speaks only of the "contracting State".

[1012] The appropriateness in French of describing a single word as an "expression" may be questionable, but as this terminological inflection is enshrined in custom it does not seem advisable to question it.

[1013] Art. 2, para. 1 (a). See also, for example, the Judgment of 1 July 1994 of the International Court of Justice in the case concerning *Maritime Delimitation and Territorial Questions between* is defined therein as "a unilateral statement, however phrased or named"[1014], and the Commission used the same term to define interpretative declarations.[1015] The same must apply to objections: here again, it is the intention that counts. The question remains, however, as to what this intention is: this problem is at the heart of the definition proposed in guideline 2.6.1.

(9) At first sight, the word "objection" has nothing mysterious about it. According to the *Dictionnaire de droit international public*, the "opposition expressed by a subject of law to an act or a claim by another subject of law in order to prevent its entry into force or its opposability to the first subject".[1016] The same work defines "objection to a reservation" as follows: "Expression of rejection by a State of a reservation to a treaty formulated by another State, where the aim of the reservation is to oppose the applicability between the two States of the provision or provisions covered by the reservation, or, if such is the intention stated by the author of the objection, to prevent the entry into force of the treaty as between those two States".[1017]

(10) This latter clarification has its basis in article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions, which envisages that the author of the objection may indicate whether it opposes the entry into force of the treaty between it and the author of the reservation. In such a case, the intention of the author of the unilateral statement to object to the reservation is not in doubt.

(11) This might not be true of all categories of reactions to a reservation, which might show misgivings on the part of their authors without amounting to an objection as such.

(12) As the arbitral tribunal that settled the dispute between France and the United Kingdom concerning the delimitation of the continental shelf stated in its decision of 30 June 1977:

> "Whether any such reaction amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the State concerned."[1018]

In this case, the tribunal did not expressly take a position on the nature of the United Kingdom's "reaction", but it "acted as if it were an objection",[1019] namely, by applying the rule set out in article 21, paragraph 3, of the 1969 Vienna Convention, which, however, was not in force between the parties.

Qatar and Bahrain, I.C.J. Reports 1994, p. 112, para. 3: "... international agreements may take a number of forms and be given a diversity of names".

[1014] Art. 2, para. 1 (d).

[1015] See guideline 1.2 and the commentary thereto (in particular, paragraphs (14) and (15)) and the examples of "renaming" (*ibid.*, and in the commentary to guideline 1.3.2, "Phrasing and name").

[1016] Jean Salmon, ed., *Dictionnaire de droit international public* (Brussels, Bruylant/AUF, 2001), p. 763.

[1017] *Ibid.*, p. 764. It need hardly be stated that this definition applies also to an objection formulated by an international organization.

[1018] Decision of 30 June 1977, *UNRIAA*, vol. XVIII, pp. 32–33, para. 39. See footnote 24 above.

[1019] Pierre-Henri Imbert, "La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande Bretagne et d'Irlande du Nord", *A.F.D.I.*, 1978, p. 45.

(13) The arbitral award has been criticized in this regard,[1020] but it appears indisputable that the wording of the British statement in question clearly reflects the intention of the United Kingdom to object to the French reservation. The statement reads as follows:

> "The Government of the United Kingdom are unable to accept reservation (b)."[1021]

The refusal to accept a reservation is precisely the purpose of an objection in the full sense of the word in its ordinary meaning.

(14) As the Anglo-French arbitral tribunal noted, it can happen that a reaction to a reservation, even if critical of it, does not constitute an objection in the sense of articles 20–23 of the Vienna Conventions. The reaction may simply consist of observations, in which a State or an international organization announces its (restrictive) interpretation of the reservation or the conditions under which it considers it to be permissible. For example, "in 1979, the United Kingdom, Germany and France reacted to the reservation made by Portugal to the protection of property rights contained in article 1 of the Protocol to the European Convention on Human Rights. By making this reservation, Portugal intended to exclude the sweeping expropriation and nationalization measures, which had been adopted in the wake of the Carnations Revolution, from any challenge before the European Commission and Court of Human Rights. The reacting States did not formally object to the reservation made by Portugal, but rather made declarations to the effect that it could not affect the general principles of international law which required the payment of prompt, adequate and effective compensation in respect of the expropriation of foreign property. Following constitutional and legislative amendments, Portugal withdrew this reservation in 1987".[1022]

(15) The following examples can be interpreted in the same way:

- The communications whereby a number of States indicated that they did not regard "the statements [[1023]] concerning article 11, paragraph 1, [of the 1961 Vienna Convention on Diplomatic Relations] made by the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics and the Mongolian People's Republic as modifying any rights or obligations under that paragraph";[1024] the communications could be seen as interpretations of the statements in question (or of the provision to which they relate) rather than as true objections, particularly in contrast with other statements formally presented as objections;[1025]

[1020] *Ibid.*

[1021] *UNRIAA*, vol. XVIII, p. 162, para. 40.

[1022] J. Polakiewicz, footnote 638 above, p. 106; footnotes omitted.

[1023] These statements, in which the parties concerned explained that they consider "that any difference of opinion regarding the size of a diplomatic mission should be settled by agreement between the sending State and the receiving State", they expressly termed "reservations" (*Multilateral Treaties …*, chap. III.3).

[1024] *Ibid.*, Australia, Canada, Denmark, France, Malta, New Zealand, Thailand and the United Kingdom.

[1025] *Ibid.*, statements by Greece, Luxembourg and the Netherlands, or the United Republic of Tanzania and the more ambiguous statement by Belgium. See also, for example, the last paragraph of the communication of the United Kingdom concerning the reservations and declarations accompanying the instrument of ratification deposited by the Union of Soviet Socialist Republics to the 1969 Vienna Convention on the Law of Treaties (*ibid.*, chap. XXIII.1) or the reaction of Norway to the corrective "declaration" of France dated 11 August 1982 regarding the 1978 Protocol to the International Convention for the Prevention of Pollution from Ships (MARPOL) (a declaration that clearly appears to be a reservation and to which Sweden

- The communication of the United States of America regarding the first reservation of Colombia to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988, in which the United States Government says that it understands the reservation "to exempt Colombia from the obligations imposed by article 3, paragraphs 6 and 9, and article 6 of the Convention only insofar as compliance with such obligations would prevent Colombia from abiding by article 35 of its Political Constitution (regarding the extradition of Colombian nationals by birth), *to the extent that* the reservation *is intended to* apply other than to the extradition of Colombian nationals by birth, the Government of the United States *objects* to the reservation";[1026] this is an example of a "conditional acceptance" rather than an objection strictly speaking; or
- The communications of the United Kingdom, Norway and Greece concerning the declaration of Cambodia with regard to the Convention on the International Maritime Organization.[1027]

(16) Such "quasi-objections" have tended to proliferate in recent years with the growth of the practice of the "reservations dialogue". What the dialogue entails is that States inform the reserving State in more or less formal terms of the reasons why they think the reservation should be withdrawn, clarified or modified. Such communications may be true objections, but they may — and often do — initiate a dialogue that might indeed lead to an objection, although it might also result in the modification or withdrawal of the reservation. The reaction of Finland to the reservations formulated by Malaysia on its accession to the Convention on the Rights of the Child of 1989 clearly falls into the first category and undoubtedly constitutes an objection:

> "In its present formulation the reservation is clearly incompatible with the object and purpose of the Convention and therefore inadmissible under article 51, paragraph 2, of the [said Convention]. Therefore the Government of Finland *objects to such reservation*. The Government of Finland further notes that the reservation made by the Government of Malaysia is devoid of legal effect."[1028]

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and Italy had objected as such) stating that it considered it to be a declaration and not a reservation, IMO, *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or Its Secretary General Performs Depositary or Other Functions (as at 31 May 2011)*, p. 81, note 1.

[1026] *Multilateral Treaties ...*, chap. VI.19 (emphasis added). Colombia subsequently withdrew the reservation (*ibid.*).

[1027] *Ibid.*, chap. XII.1.

[1028] *Ibid.*, chap. IV.11 (emphasis added). The full text of this objection reads as follows:

> "The reservation made by Malaysia covers several central provisions of the [said Convention]. The broad nature of the said reservation leaves open to what extent Malaysia commits itself to the Convention and to the fulfilment of its obligations under the Convention. In the view of the Government of Finland reservations of such comprehensive nature may contribute to undermining the basis of international human rights treaties.
>
> "The Government of Finland also recalls that the said reservation is subject to the general principle of the observance of the treaties according to which a party may not invoke its internal law, much less its national policies, as justification for its failure to perform its treaty obligations. It is in the common interest of the States that contracting parties to international treaties are prepared to undertake the necessary legislative changes in order to fulfil the object and purpose of the treaty. Moreover, the internal legislation as well as the national policies are also subject to changes which might further expand the unknown effects of the reservation.

(17) Whether or not the reaction of Austria to the same reservations, a reaction also thoroughly reasoned and directed towards the same purpose, can be considered to be an objection is more debatable; Austria's statement of 18 June 1996 contains no language expressive of a definitive rejection of Malaysia's reservations but suggests instead a waiting stance:

> "Under article 19 of the Vienna Convention on the Law of Treaties, which is reflected in article 51 of the [Convention on the Rights of the Child], a reservation, in order to be admissible under international law, has to be compatible with the object and purpose of the treaty concerned. A reservation is incompatible with the object and purpose of a treaty if it intends to derogate from provisions the implementation of which is essential to fulfilling its object and purpose.
>
> "The Government of Austria has examined the reservation made by Malaysia to the [Convention]. Given the general character of these reservations a final assessment as to *its admissibility* under international law *cannot be made without further clarification.*
>
> "*Until* the scope of the legal effects of this reservation is sufficiently specified by Malaysia, the Republic of Austria considers these reservations as not affecting any provision the implementation of which is essential to fulfilling the object and purpose of the [Convention].
>
> "Austria, however, objects to the admissibility of the reservations in question *if* the application of this reservation negatively affects the compliance of Malaysia … with its obligations under the [Convention] essential for the fulfilment of its object and purpose.
>
> "Austria could not consider the reservation made by Malaysia ... as admissible under the regime of article 51 of the [Convention] and article 19 of the Vienna Convention on the Law of Treaties *unless* Malaysia …, by *providing additional information or through subsequent practice*, ensure[s] that the reservations are compatible with the provisions essential for the implementation of the object and purpose of the [Convention]."[1029]

Here again, rather than a straightforward objection, the statement can be considered a conditional acceptance (or conditional objection) with a clear intent (to induce the reserving State to withdraw or modify its reservation) but the legal status and effects of which are uncertain, if only because the conditions for accepting or rejecting the reservation are not susceptible to an objective analysis and no particular time limit is set.

(18) Such statements pose problems comparable to those raised by communications in which a State or an international organization "reserves its position" regarding the

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> "In its present formulation the reservation is clearly incompatible with the object and purpose of the Convention and therefore inadmissible under article 51, paragraph 2, of the [said Convention]. Therefore the Government of Finland *objects to such reservation*. The Government of Finland further notes that the reservation made by the Government of Malaysia is devoid of legal effect.
>
> "The Government of Finland recommends the Government of Malaysia to reconsider its reservation to the [said Convention]."

For even clearer objections to the reservations of Malaysia, see the statements of Germany, Ireland, the Netherlands, Norway, Portugal and Sweden and the communications of Belgium and Denmark (*ibid.*). Malaysia subsequently withdrew part of its reservations (*ibid.*).

[1029] *Ibid.* – emphasis added. See also the reaction of Sweden to Canada's reservation to the Espoo Convention of 25 February 1991, *ibid.*, chap. XXVII.4.

permissibility of a reservation. For example, there is some doubt as to the scope of the statement by the Netherlands to the effect that the Government of the Netherlands "reserves all rights regarding the reservations made by the Government of Venezuela on ratifying [the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone] in respect of article 12 and article 24, paragraphs 2 and 3".[1030] The same could be said of the statement by the United Kingdom to the effect that it was "not however able to take a position on [the] purported reservations [of the Republic of Korea to the International Covenant on Civil and Political Rights] in the absence of a sufficient indication of their intended effect, in accordance with the terms of the Vienna Convention on the Law of Treaties and the practice of the Parties to the Covenant. Pending receipt of such indication, the Government of the United Kingdom reserve their rights under the Covenant in their entirety".[1031] Similarly, the nature of the reactions of several States[1032] to the limitations that Turkey had set on its acceptance of the right of individual petition under former article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe is not easy to determine. These States, using a number of different formulas, communicated to the Secretary-General of the Council of Europe that they "reserved their position" pending a decision by the competent organs of the Convention, explaining that "the absence of a formal and official reaction on the merits of the problem should not … be interpreted as a tacit recognition … of the Turkish Government's reservations".[1033] It is hard to see these as objections; rather, they are notifications of provisional "non-acceptance" associated with a waiting stance. In contrast, an objection involves taking a formal position seeking to prevent the reservation from having the effects intended by its author.

(19) It does not follow that reactions of the type mentioned above[1034] which other contracting States or organizations to the treaty may have with respect to the reservations formulated by a State or an international organization are prohibited, or even that they produce no legal effects. However, such reactions are not objections within the meaning of the Vienna Conventions, and their effects relate to the interpretation of the treaty or the unilateral acts constituted by the reservations, or else they form part of the "reservations dialogue" that the treaty's other contracting States or organizations try to initiate with the author of the reservation. These uncertainties clearly illustrate the value of using precise and unambiguous terminology in the description of a reaction to a reservation, in its phrasing and in the definition of the scope which the author of an objection intends to give to it.[1035]

[1030] *Multilateral Treaties* ..., chap. XXI.1. See also the examples given by F. Horn, footnote 25 above, pp. 318 and 336 (Canada's reaction to France's reservations and declarations to the same Convention).

[1031] *Multilateral Treaties* ..., chap. IV.4. See also the communication of the Netherlands concerning the Australian reservations to article 10 of the Covenant (*ibid.*); on the other hand, the reaction of the Netherlands to the Australian reservations to articles 2 and 50 of the Covenant has more the appearance of an interpretation of the reservations in question (*ibid.*).

[1032] Belgium, Denmark, Luxembourg, Norway and Sweden. Such limitations do not constitute reservations within the meaning of the Guide to Practice (see guideline 1.5.3, paragraph 2), but the example given by Polakiewicz (footnote 638 above, p. 107) is no less striking by analogy.

[1033] Statement of Luxembourg. The text of these different statements is reproduced in the judgement of 23 March 1995 of the European Court of Human Rights in the case of *Loizidou v. Turkey (Preliminary Objections)*, ECHR, Ser. A, vol. 310, pp. 12–13, paras. 18–24.

[1034] See paragraphs (13)–(17) of the commentary to the present guideline.

[1035] See in this respect the "Model response clauses to reservations" appended to Recommendation No. R (99) 13 adopted on 18 May 1999 by the Committee of Ministers of the Council of Europe. It should be noted that all the alternative wordings proposed in that document expressly utilize the word "objection". On the disadvantages of vague and imprecise objections, see F. Horn, footnote 25 above, pp. 184–185; see also pp. 191–197 and 221–222.

(20) As to the first point — the description of the reaction — the most prudent solution is certainly to use the noun "objection" or the verb "object". Such other terms as "opposition/oppose",[1036] "rejection/reject",[1037] and "refusal/refuse" must also, however, be regarded as signifying objection. Unless a special context demands otherwise, the same is true of expressions like "the Government of … does not accept the reservation …"[1038] or "the reservation formulated by … is impermissible/unacceptable/inadmissible".[1039] Such is also the case when a State or an international organization, without drawing any express inference, states that a reservation is "prohibited by the treaty",[1040] "entirely void"[1041] or simply "incompatible with the object and purpose"[1042] of the treaty, which is extremely frequent. Even if the author of a statement made in such a way does not openly purport to preclude the reservation from producing its intended effects, it is still expressing opposition to the reservation or, in any case, its firm intention not to accept it. Such statements also constitute objections within the meaning of the Vienna Convention, and this is taken into account with the expression "otherwise opposes the reservation" in guideline 2.6.1.

(21) The fact remains that in some cases States intend their objections to produce effects other than those expressly provided for in article 21, paragraph 3, of the Vienna Conventions. The question that then arises is whether, strictly speaking, these can be called objections.

(22) This provision contemplates only two possibilities:

- Either "the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation"; this is the "minimum" effect of an objection;
- Alternatively, if the State or international organization formulating an objection to a reservation clearly states that such is its intention, in accordance with the provisions of article 20, paragraph 4 (b), the treaty does not enter into force between itself and the reserving State or organization; this is generally known as the "maximum" effect of an objection.[1043]

[1036] See also the objection of Finland to the reservation by Malaysia to the Convention on the Rights of the Child, paragraph (16), above.

[1037] See, for example, the objection of Guatemala to the reservations of Cuba to the Vienna Convention on Diplomatic Relations of 1961 (*Multilateral Treaties …*, chap. III.3).

[1038] See, for example, the objections of the Australian Government to various reservations to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (*Multilateral Treaties …*, chap. IV.1) and of the Government of the Netherlands to numerous reservations to the Convention on the High Seas of 1958 (*ibid.*, chap. XXI.2). See also the British objection to French reservation (b) to article 6 of the Geneva Convention on the Continental Shelf, paragraph (13) above.

[1039] See, for example, the reaction of Japan to reservations made to the Convention on the High Seas of 1958 (*Multilateral Treaties …*, chap. XXI.2) or that of Germany to the Guatemalan reservation to the Convention relating to the Status of Refugees of 1951 (*ibid.*, chap. V.2).

[1040] See, for example, all the communications relating to the declarations made under article 310 of the United Nations Convention on the Law of the Sea of 1982 (*Multilateral Treaties …*, chap. XXI.6).

[1041] See, for example, the reactions of the European Community to the declarations of Bulgaria and the German Democratic Republic regarding the TIR Convention of 1975 (*ibid.*, chap. XI-A.16).

[1042] See, for example, the statement by Portugal concerning the reservations of Maldives to the Convention on the Elimination of All Forms of Discrimination against Women of 1979 (*ibid.*, chap. IV.8) and that by Belgium concerning the reservations of Singapore to the Convention on the Rights of the Child of 1989 (*ibid.*, chap. IV.11).

[1043] R. Riquelme Cortado, footnote 150 above, pp. 279–280; F. Horn, footnote 25 above, pp. 170–172.

(23) However, there is in practice an intermediate stage between the "minimum" and "maximum" effects of the objection, contemplated in this provision, since there are situations in which a State wishes to enter into treaty relations with the author of the reservation while at the same time considering that the effect of the objection should go beyond what is provided for in article 21, paragraph 3.[1044]

(24) Similarly, the objecting State may intend to produce what has been described as a "super-maximum" effect,[1045] consisting in the determination not only that the reservation objected to is not valid but also that, as a result, the treaty as a whole applies *ipso facto* in the relations between the two States. This is the case, for example, with Sweden's objection of 27 November 2002 to the reservation that Qatar made when acceding to the Optional Protocol of 25 May 2000 to the Convention on the Rights of the Child:

> "This objection shall not preclude the entry into force of the Convention between Qatar and Sweden. The Convention enters into force in its entirety between the two States, without Qatar benefiting from its reservation."[1046]

(25) Although the effect of such objections may have been questioned,[1047] the fact is that the authors *intend* their objection to produce such intermediate or "super-maximum" effects. Just as the definition of reservations does not prejudge their permissibility, so, in stating in guideline 2.6.1 that, by objecting, the "State or organization purports to preclude the reservation from producing its intended effects", the Commission has endeavoured to take a completely neutral position with regard to the validity of the effects that the author of the objection intends its objection to produce. This is a matter to be taken up in the consideration of the effects of objections.

(26) The expression "or otherwise opposes the reservation", meanwhile, purports to recall that, in some cases, the author of the objection is aware that it will produce no concrete effect. This is especially true of objections made to reservations that are considered by the author as being contrary to the object and purpose of the treaty,[1048] However, even when an objection to a reservation is permissible, the legal effect of the objection might not have any concrete effect on the treaty relationship "to the extent of the reservation".[1049] Nevertheless, it is quite literally an objection that ultimately produces effects different from those produced by an

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[1044] See guidelines 3.4.2 and 4.3.7 and commentaries thereto. In this regard, see, for example, Canada's objection to Syria's reservation to the 1969 Vienna Convention: " ... Canada does not consider itself in treaty relations with the Syrian Arab Republic in respect of those provisions of the Vienna Convention on the Law of Treaties to which the compulsory conciliation procedures set out in the annex to that Convention are applicable" (*Multilateral Treaties ...*, chap. XXIII.1). For other examples and for a discussion of the permissibility of this practice, see below. See also R.W. Edwards, footnote 59 above, p. 400.

[1045] See Bruno Simma, "Reservations to Human Rights Treaties – Some Recent Developments", in Gerhard Hafner (ed.), *Liber Amicorum, Professor Ignaz Seidl-Hohenveldern: In Honour of His 80th Birthday* (The Hague, Kluwer, 1998), p. 659. R. Riquelme Cortado, footnote 150 above, pp. 300–305. On this issue, see guideline 4.5.3 and commentary thereto.

[1046] *Multilateral Treaties ...*, chap. IV.11.C; see also Norway's objection of 30 December 2002 (*ibid.*).

[1047] See guideline 4.5.3 and the commentary thereto.

[1048] See guideline 4.5.2 (Reactions to an invalid reservation) and especially paragraph (7) of the commentary thereto; see also Alain Pellet and Daniel Müller, "Reservations to Treaties: An Objection to a Reservation is Definitely not an Acceptance", in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011), pp. 54–59.

[1049] See guideline 4.3.6, paragraph 2; see also Pellet and Müller, *ibid.*, p. 50.

acceptance, particularly with regard to the entry into force of the treaty for the author of the reservation.[1050]

(27) This being so, notwithstanding the contrary opinion of some writers,[1051] no rule of international law requires a State or an international organization to state its reasons for objecting to a reservation. Except where a specific reservation is expressly authorized by a treaty,[1052] the other States and organizations are always free to reject it for any reason whatsoever and even not to enter into treaty relations with its author. A statement drafted as follows:

> "The Government … intends to formulate an objection to the reservation made by … "[1053]

is as valid and legally sound as a statement setting forth a lengthy argument.[1054] There is, however, a recent but unmistakable trend towards specifying and explaining the reasons that justify the objection in the eyes of the author, and guideline 2.6.9. seeks to encourage States and international organizations to do just this.

(28) The Commission also wishes to point out that it is aware that the word "made", which appears in the definition ("a unilateral statement ... *made* by a State or an international organization") is open to discussion: taken literally, it might be understood as meaning that the objection produces effects *per se* without any other condition having to be met. The word "made" was chosen for reasons of symmetry, because it appears in the definition of reservations. On the other hand, it is preferable to indicate that the objection is made "in response to a reservation to a treaty *formulated* by another State or international organization", as a reservation only produces effects if it is "established with regard to another party in accordance with articles 19, 20 and 23".[1055]

(29) The expression "*in response to a reservation to a treaty formulated* by another State or another international organization"[1056] would seem to suggest that an objection may be made by a State or an international organization only after a reservation has been *formulated. A priori*, this would seem quite logical, but in the Commission's view this conclusion is hasty.

[1050] Pellet and Müller, *ibid.*, pp. 42–46 and p. 53.

[1051] L. Lijnzaad, footnote 463 above, p. 45, cites in this respect R. Kühner, *Vorbehalte zu multilateralen völkerrechtlichen Verträgen* (Berlin, 1986), p. 183 and P. Szafarz, footnote 27 above, p. 309; where the last-mentioned author is concerned, this does not, however, appear to be her true position. Practice indicates that States do not feel bound to give reasons for their objections; see, *inter alia*, F. Horn, footnote 25 above, p. 131 and pp. 209–219.

[1052] See in this respect the arbitral award of 30 June 1977 in the Anglo-French case on the *Delimitation of the Continental Shelf*: "Only if the Article had authorised the making of specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance" (*UNRIAA*, vol. XVIII, p. 32, para. 39; see footnote 24 above). Imbert even thinks that an expressly authorized reservation can be objected to (P.-H. Imbert, footnote 25 above, pp.151–152). See also guideline 2.8.13 below.

[1053] Among the many examples, see the statements by Australia concerning the reservations of Mexico to the Convention on the Territorial Sea and the Contiguous Zone of 1958 (*Multilateral Treaties …*, chap. XXI.1) and the Convention on the High Seas of 1958 (*ibid.*, chap. XXI.2). See also those by Belgium, Finland, Italy, Norway and the United Kingdom concerning the reservation formulated by Yemen to the International Convention on the Elimination of All Forms of Racial Discrimination of 1966 (*ibid.*, chap. IV.2), or statements by Austria concerning the reservation formulated by El Salvador to the Convention on the Rights of Persons with Disabilities of 2006 (*ibid.*, chap. IV.15).

[1054] See footnote 1028 above for an example.

[1055] Art. 21, para. 1; see also section 4.1 of the Guide to Practice.

[1056] Emphasis added.

(30) State practice in fact demonstrates that States also raise objections for "pre-emptive" purposes. Chile, for example, formulated the following objection to the 1969 Vienna Convention on the Law of Treaties:

> "The Republic of Chile formulates an objection to the reservations which have been made or may be made in the future relating to article 62, paragraph 2, of the Convention."[1057]

In the same vein, Japan raised the following objection:

> "The Government of Japan objects to any reservation intended to exclude the application, wholly or in part, of the provisions of article 66 and the Annex concerning the obligatory procedures for settlement of disputes and does not consider Japan to be in treaty relations with any State which has formulated or will formulate such reservation, in respect of those provisions of Part V of the Convention regarding which the application of the obligatory procedures mentioned above are to be excluded as a result of the said reservation."[1058]

However, in the second part of this objection the Japanese Government noted that the effects of this objection should apply *vis-à-vis* the Syrian Arab Republic and Tunisia. It subsequently reiterated its declaration to make it clear that the same effects should be produced *vis-à-vis* the German Democratic Republic and the USSR, which had formulated reservations similar to those of the Syrian Arab Republic and Tunisia.[1059] Other States have raised new objections in reaction to every reservation to the same provisions newly formulated by another State party.[1060]

(31) The Japanese objection to the reservations formulated by the Government of Bahrain and the Government of Qatar to the 1961 Vienna Convention on Diplomatic Relations also states that not only are the two reservations in question regarded as impermissible, but that this [Japan's] "position is applicable to any reservations to the same effect to be made in the future by other countries".[1061]

(32) The objection of Greece regarding reservations to the Convention on the Prevention and Punishment of the Crime of Genocide also belongs in this category of advance objections. It states:

> "We further declare that we have not accepted and do not accept any reservation which has already been made or which may hereafter be made by the countries signatory to this instrument or by countries which have acceded or may hereafter accede thereto."[1062]

A general objection was also raised by the Netherlands concerning the reservations to article IX of the same convention. Although this objection lists the States that had already formulated such a reservation, it concludes: "The Government of the Kingdom of the Netherlands therefore does not deem any State which has made or which will make such reservation a party to the Convention." This objection was, however, reiterated in 1996 with respect to the reservations made by Malaysia and Singapore and, on the same occasion, withdrawn in relation to Hungary, Bulgaria and Mongolia, which had withdrawn their reservations.[1063]

[1057] *Multilateral Treaties ...*, chap. XXIII.1.

[1058] *Ibid.*

[1059] *Ibid.*

[1060] See, for example, the declarations and objections of Germany, the Netherlands, New Zealand, the United Kingdom and the United States to the comparable reservations of several States to the 1969 Vienna Convention (*ibid.*).

[1061] *Ibid.*, chap. III.3.

[1062] *Ibid.*, chap. IV.1. Despite this general objection, Greece raised two further objections with regard to the reservation of the United States (*ibid.*).

(33) Thus State practice is far from uniform in this regard. The Commission believes that there is nothing to prevent a State or international organization from formulating pre-emptive or precautionary objections before a reservation has been formulated or, in the case of reservations already formulated, from declaring in advance its opposition to any similar or identical reservation.

(34) Such advance objections do not, of course, produce the effects contemplated in article 20, paragraph 4, and article 21, paragraph 3, of the Vienna Conventions until a corresponding reservation is formulated by another contracting State or contracting organization. This situation is rather similar to that of a reservation formulated by a State or international organization that is a signatory but not yet a party, against which another contracting State or organization has raised an objection; objections of this kind do not produce their effects until the reserving State expresses its consent to be bound by the treaty.[1064] An advance objection nevertheless constitutes notice that its author will not accept certain reservations. As the International Court of Justice has noted, such notice safeguards the rights of the objecting State and warns other States intending to formulate a corresponding reservation that such a reservation will be met with an objection.[1065]

2.6.2 Right to formulate objections

A State or an international organization may formulate an objection to a reservation irrespective of the permissibility of the reservation.

Commentary

(1) It is now well established that a State or an international organization may make an objection to a reservation formulated by another State or another international organization, irrespective of the question of the permissibility of the reservation.[1066] Although this right is quite extensive, it is not unlimited.

(2) The *travaux préparatoires* of the 1969 Vienna Convention leave no doubt as to the discretionary nature of the formulation of objections but are not very enlightening on the question of who may formulate them.[1067]

(3) In its 1951 advisory opinion, the International Court of Justice made an analogy between the permissibility of objections and that of reservations. It considered that:

> "The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct

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[1063] *Ibid.*

[1064] See guideline 2.6.11.

[1065] See the citations from the Court's advisory opinion of 1951 (footnote 604 above) in paragraph (5) of the commentary to guideline 2.6.11.

[1066] See also guideline 4.5.2 and the commentary thereto.

[1067] See guideline 2.6.3 and the commentary thereto.

> which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation."[1068]

(4) Draft article 20, paragraph 2 (b), adopted by the Commission on first reading in 1962 after heated debate,[1069] endorsed that position and established a link between the objection and the incompatibility of the reservation with the object and purpose of the treaty, which seemed to be the *sine qua non* for permissibility in both cases. The provision stated:

> "An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State."[1070]

(5) In response to the comments made by the Australian, Danish and United States Governments,[1071] however, the Special Rapporteur reverted to the position taken by the Commission on first reading, omitting the reference to the criterion of compatibility from his proposed draft article 19, paragraph 3 (b).[1072] The contrary opinion was nonetheless supported once more by Sir Humphrey Waldock in the Commission's debates,[1073] but that did not prevent the Drafting Committee from once again leaving out any reference to the compatibility criterion – without, however, providing any explanation for its having done so.[1074] In accordance with that position, paragraph 4 (b) of draft article 19, adopted on second reading in 1965, merely provided that "an objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State".[1075]

(6) Despite the doubts voiced by a number of delegations,[1076] the Vienna Conference of 1968–1969 made no further reference to the lack of a connection between objections and the criteria of a reservation's permissibility. In response to a question raised by the Canadian representative, however, the Expert Consultant, Sir Humphrey Waldock, was particularly clear in his support for the position adopted by the Commission:

> "The second question was, where a reservation had not been expressly authorized, and at the same time was not one prohibited under article 16, paragraph (*c*), could a contracting State lodge an objection other than that of incompatibility with the object

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[1068] *I.C.J. Reports 1951*, footnote 604 above, p. 24.

[1069] The criterion of compatibility with the object and purpose of the treaty played a large part in the early debates on reservations (*Yearbook … 1962*, vol. I, 651st–656th meetings). One of the leading advocates of the link between this criterion and reactions to a reservation was S. Rosenne, who based his arguments on the advisory opinion of the International Court of Justice (see footnote 1068 above) (*Yearbook … 1962*, vol. I, 651st meeting, para. 79).

[1070] *Yearbook … 1962*, vol. II, p. 176.

[1071] Fourth report on the law of treaties (A/CN.4/177 and Add.1), *Yearbook … 1965*, vol. II, pp. 45–47.

[1072] *Ibid.*, p. 52, para. 10.

[1073] *Yearbook … 1965*, vol. I, 799th meeting, para. 65. See also Mr. Tsuruoka, *ibid.*, para. 69. For an opposing view, see Mr. Tunkin, *ibid.*, para. 37.

[1074] *Yearbook … 1965*, vol. I, 813th meeting, paras. 30–71 and, in particular, paras. 57–66.

[1075] *Yearbook … 1965*, vol. II, p. 162.

[1076] See, in particular, the United States amendment (A/CONF.39/C.1/L.127 in *Documents of the Conference* (A/CONF.39/11/Add.2), footnote 54 above, p. 135) and the comments of the United States representative (*First Session, Summary records*, footnote 35 above, 21st meeting, para. 11). See also the critical comments made by Japan (*ibid.*, 21st meeting, para. 29), Philippines (*ibid.*, para. 58), United Kingdom (*ibid.*, para. 74), Switzerland (*ibid.*, para. 41), Sweden (*ibid.*, 22nd meeting, para. 32) and Australia (*ibid*, para. 49).

> and purpose of the treaty? The answer was surely Yes. Each contracting State remained *completely free* to decide for itself, in accordance with its own interests, whether or not it would accept the reservation."[1077]

(7) On this point, the Vienna regime deviates from the solution adopted by the International Court of Justice in its 1951 advisory opinion,[1078] which, in this regard, is certainly outdated and no longer corresponds to current positive law.[1079] A State or an international organization has the right to formulate an objection both to a reservation that does not meet the criteria for permissibility and to a reservation that it deems to be unacceptable "in accordance with its own interests", even if it is permissible. In other words, States and international organizations are free to object for any reason whatsoever, and that reason may or may not have to do with the impermissibility of the reservation.[1080]

(8) This solution is based on the principle of consent, which underlies the reservations regime and indeed all treaty law, as the Court recalled in its 1951 advisory opinion:

> "It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto."[1081]

(9) A State (or an international organization) is thus, never bound by treaty obligations[1082] against its will. A State that formulates a reservation is simply proposing a modification of the treaty relations contemplated by the treaty. [1083] Conversely, no State is obliged to accept such modifications — other than those resulting from reservations expressly authorized by the treaty — as long as they are not contrary to the object and purpose of the treaty.[1084] Limiting

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[1077] *First Session, Summary records*, footnote 35 above, 25th meeting, para. 3 (emphasis added).

[1078] See paragraph (3) above. See also M. Coccia, footnote 196 above, pp. 8–9; R.W. Edwards, footnote 59 above, p. 397; L. Lijnzaad, footnote 463 above, p. 51; Karl Zemanek, "Some Unresolved Questions Concerning Reservations in the Vienna Convention on the Law of Treaties", *Études en droit international en l'honneur du Juge Manfred Lachs* (The Hague/Boston/Lancaster, Martinus Nijhoff Publishers, 1984), p. 333.

[1079] It is also unlikely that it reflected the state of positive law in 1951. No one seems ever to have claimed that the right to formulate objections in the context of the system of unanimity was subject to the reservation being contrary to the object and purpose of the treaty.

[1080] Subject, of course, to the general principles of law which may limit the exercise of the discretionary power of States at the international level and the principle prohibiting abuse of rights.

[1081] Opinion cited in footnote 1068 above, p. 21. The dissenting judges also stressed this principle in their joint opinion: "The consent of the parties is the basis of treaty obligations. The law governing reservations is only a particular application of this fundamental principle, whether the consent of the parties to a reservation is given in advance of the proposal of the reservation or at the same time or later." (*ibid.*, pp. 31–32). See also the famous dictum of the Permanent Court of International Justice in the case of the *S.S. "Lotus"*: "The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexisting independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed." (Judgment of 7 September 1927, *P.C.I.J.*, Series A, No. 10, p. 18). See also A/CN.4/477/Add.1, paras. 97 and 99.

[1082] This clearly does not mean that States are not bound by legal obligations emanating from other sources (see section 4.4 of the Guide to Practice).

[1083] See paragraph (6) of the commentary to guideline 3.1.

[1084] See F. Horn, footnote 25 above, p. 121; Christian Tomuschat, "Admissibility and Legal Effects of Reservations to Multilateral Treaties", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 27 (1967), p. 466.

the right to formulate objections to reservations that are contrary to one of the criteria for permissibility established in article 19 would violate the sovereign right to accept or refuse treaty obligations[1085] and would contravene the very principle of the sovereign equality of States, since it would allow the reserving State (or international organization) to impose its will unilaterally on the other contracting States or international organizations.[1086] In practice, this would render the mechanism of acceptances and objections meaningless.[1087]

(10) It would thus seem that States and international organizations have the indisputable right to formulate in a discretionary manner objections to reservations. This is clear from guideline 2.6.1, which defines "objection" in terms of the intent of its author, irrespective of the reasons for or permissibility of the reservation to which the objection relates. It is thus acknowledged that the author may exercise that right regardless of the permissibility of the reservation – in other words, that the author may make an objection for any reason, be it simply political or of expediency, without having to explain that reason,[1088] unless the objection itself is to be regarded as impermissible on some grounds. [1089]

(11) However, "discretionary" does not mean "arbitrary",[1090] and even though this right undoubtedly stems from the power of a party to exercise its own judgement, it is not absolute. Above all, it must be exercised within the limits arising from the procedural and formal constraints as developed and set out in detail in the guidelines that follow in this section of the Guide to Practice. Thus, for example, a State or international organization that has accepted a reservation no longer has the right to make a subsequent objection to the same reservation. This rule derives implicitly from the presumption of acceptance of reservations established in article 20, paragraph 5, of the Vienna Conventions, a presumption spelt out in guideline 2.8.2, which concerns the procedure for acceptances. Moreover, guideline 2.8.13 expressly enunciates the final nature of acceptance.

(12) This absence of a link between the permissibility of a reservation and the objection does not, however, fully resolve the question of the validity of an objection. It goes without saying that the right to formulate an objection must be exercised in accordance with the provisions of the Vienna Conventions and this Guide – a point that did not seem to require mention in the text of guideline 2.6.2.

2.6.3 Author of an objection

An objection to a reservation may be formulated by:

[1085] C. Tomuschat, *ibid.*

[1086] See in this regard the ninth of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, adopted by the International Law Commission at its fifty-eighth session (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 379).

[1087] See Daniel Müller, *Commentaire de l'article 20* (1969), in O. Corten and P. Klein (eds.), *Les Conventions de Vienne sur le droit des traités* ..., footnote 30 above, p. 837, para. 74 and 1969 Vienna Convention Article 20, in Olivier Corten and Pierre Klein (eds.), *The Vienna Conventions on the Law of Treaties* ..., footnote 30 above, pp. 513–514, para. 62; see also the statement made by Mr. Pal at the 653rd meeting of the Commission (*Yearbook ... 1962*, vol. I, p. 153, para. 5).

[1088] In this regard, however, see guideline 2.6.9.

[1089] See guideline 3.4.2 and the commentary thereto.

[1090] See, in particular, Stevan Jovanović, *Restriction des compétences discrétionnaires des États en droit international* (Paris, Pedone, 1988), p. 88 ff, pp. 90–93; see also Judgement No. 191 of the International Labour Organization Administrative Tribunal in the case of *Ballo v. UNESCO*.

(i) any contracting State or contracting organization; and

(ii) any State or international organization that is entitled to become a party to the treaty, in which case the objection does not produce any legal effect until the State or international organization has expressed its consent to be bound by the treaty.

Commentary

(1) Guideline 2.6.1 on the definition of objections to reservations does not resolve the question of which States or international organizations may formulate an objection to a reservation made by another State or another international organization. That is the purpose of guideline 2.6.3.

(2) The Vienna Conventions provide some guidance on the question of the possible authors of an objection. Article 20, paragraph 4 (b), of the 1986 Convention refers to "an objection by a contracting State or by a contracting organization to a reservation ...". It is clear from this that contracting States and contracting international organizations within the meaning of article 2, paragraph 1 (f), of the 1986 Vienna Convention are without any doubt possible authors of an objection to a reservation. This hypothesis is covered by subparagraph (i) of guideline 2.6.3.

(3) According to one viewpoint, the fact that the Vienna Convention makes no reference to the right of other States or international organizations entitled to become parties to the treaty should be interpreted as excluding such a right. As a consequence, declarations formulated by States and international organizations, which thus far are entitled only to become parties to the treaty,[1091] should not be qualified as objections.

(4) In fact, the Commission is of the view that the provisions of article 20, paragraphs 4 (b) and 5, of the Vienna Conventions, make no exclusion of any kind; on the contrary, they imply that States and international organizations that are entitled to become parties to the treaty may formulate objections within the meaning of the definition contained in guideline 2.6.1. Article 20, paragraph 4 (b), simply determines the possible effects of an objection raised by a contracting State or by a contracting organization; however, the fact that paragraph 4 does not specify the effects of objections formulated by States other than contracting States or by organizations other than contracting organizations in no way means that such other States or organizations may not formulate objections.[1092] The limitation on the possible authors of an objection that article 20, paragraph 4 (b), of the Vienna Conventions might seem to imply is not in fact to be found in article 21, paragraph 3, on the effects of the objection on the application of the treaty in cases where the author of the objection has not opposed the entry into force of the treaty between itself and the reserving State. Moreover, as article 23, paragraph 1, clearly states, reservations, express acceptances and objections must be communicated not only to the contracting States and contracting international organizations but also to "other States and international organizations entitled to become parties to the treaty".[1093] Such a notification has meaning only if these other States and international organizations can in fact react to the reservation by way of an express acceptance or an

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[1091] This position seems to be defended by Belinda Clark, "The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women", *AJIL*, vol. 85 (1991), No. 2, p. 297.

[1092] In this regard, see P.-H. Imbert, footnote 25 above, p. 150.

[1093] See also article 78 (77), paragraphs 1 (e) and (f), of the Vienna Conventions, regarding the function of the depositary with regard to "States and international organizations entitled to become parties ...".

objection. Lastly, and most importantly, this position appeared to the Commission to be the only one that was compatible with the letter and spirit of guideline 2.6.1, which defines objections to reservations not in terms of the effects they produce but in terms of those that objecting States or international organizations *intend for them to produce*.[1094]

(5) This point of view is confirmed by the advisory opinion of the International Court of Justice on *Reservations to the 1951 Convention on the Prevention and Punishment of the Crime of Genocide*. In the operative part of its opinion, the Court clearly established that States that are entitled to become parties to the Convention can formulate objections:

> "The Court is of the opinion, ...
>
> (a) that an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question 1 only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;
>
> (b) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect."[1095]

(6) In practice, non-contracting States often formulate objections to reservations. For example, Haiti objected to the reservations formulated by Bahrain to the Vienna Convention on Diplomatic Relations at a time when it had not even signed the Convention.[1096] Similarly, the United States of America formulated two objections to the reservations made by the Syrian Arab Republic and Tunisia to the 1969 Vienna Convention on the Law of Treaties even though it was not — and is not — a contracting State to this Convention.[1097] Likewise, in the following examples, the objecting States were, at the time they formulated their objections, mere signatories to the treaty (which they later ratified):

- objection of Luxembourg to the reservations made by the USSR, the Byelorussian SSR and the Ukrainian SSR to the Vienna Convention on Diplomatic Relations;[1098]
- objections of the United Kingdom of Great Britain and Northern Ireland to the reservations made by Czechoslovakia, Bulgaria, the Byelorussian SSR, the Ukrainian SSR, Romania, the USSR, Iran and Tunisia to the Geneva Convention on the Territorial Sea and the Contiguous Zone[1099] and to those made by Bulgaria, Hungary,

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[1094] The definition of the term "reservation" as set out in article 2, paragraph 1 (d), of the Vienna Conventions and reproduced in guideline 1.1 is formulated in the same manner: it concerns declarations that are *intended* to produce certain effects (but that do not necessarily do so).

[1095] *I.C.J. Reports 1951*, footnote 604 above, p. 30, para. III of the provision (despite the wording of subparagraph (b), some members of the Commission are of the view that the Court was referring here only to signatory States). The same position was also taken by Sir Humphrey Waldock in his first report on the law of treaties. Draft article 19, which is devoted entirely to objections and their effects, provided that "any State which is *or is entitled to become a party* to a treaty shall have the right to object ..." (*Yearbook ... 1962*, vol. II, p. 62 (emphasis added)). However, it is noted that this language was left out of the Vienna Convention on the Law of Treaties in relation to objections.

[1096] *Multilateral Treaties ...*, chap. III.3 – date of objection: 9 May 1972, date of accession: 2 February 1978.

[1097] *Ibid.*, chap. XXIII.1.

[1098] *Ibid.*, chap. III.3 – date of signature: 2 February 1962; date of objection: 18 January 1965; date of ratification: 17 August 1966.

[1099] *Ibid.*, chap. XXI.1 – date of signature: 9 September 1958; date of objection: 6 November 1959; date of ratification: 14 March 1960.

Poland, the Byelorussian SSR, the Ukrainian SSR, Romania, Czechoslovakia, the USSR and Iran to the Geneva Convention on the High Seas;[1100] and

- objection of Belgium to the reservation made by Brazil to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[1101]

(7) In the practice of the Secretary-General as depositary, such objections formulated by States or international organizations that are entitled to become parties to the treaty are conveyed by means of "communications"[1102] and not "depositary notifications"; however, what is "communicated" are unquestionably objections within the meaning of guideline 2.6.1.

(8) It seems entirely possible that States and international organizations that are entitled to become parties to a treaty may formulate objections within the meaning of the definition contained in guideline 2.6.1 even though they have not expressed their consent to be bound by the treaty. This possibility is established in subparagraph (ii) of guideline 2.6.3.

(9) In reality, it would seem not only possible but also prudent and useful for States or international organizations that intend to become parties but have not yet expressed their consent to be bound to express their opposition to a reservation and to make their views known on the reservation in question. As the Court noted in its advisory opinion of 1951, such an objection "merely serves as a notice to the other State of the eventual attitude of the signatory State".[1103] Such notification may also prove useful both for the reserving State or organization and, in certain circumstances, for the treaty monitoring bodies.

(10) In any event, there is no doubt that an objection formulated by a State or organization that has not yet expressed its consent to be bound by the treaty does not immediately produce the legal effects intended by its author. This is evidenced also by the operative part of the advisory opinion of 1951, which states that such an objection "can have the legal effect indicated in the reply to Question I only upon ratification" by the State or the organization that formulated it.[1104] The potential legal effect of an objection formulated by a State or an international organization prior to becoming a party to the treaty is realized only upon ratification, accession or approval of the treaty (if it is a treaty in solemn form) or signature (in the case of a treaty in simplified form). This does not preclude qualifying such statements as objections; however, they are "conditional" or "conditioned" in the sense that their legal effects are subordinate to a specific act: the expression of consent to be bound.

2.6.4 Objections formulated jointly

The joint formulation of an objection by several States or international organizations does not affect the unilateral character of that objection.

Commentary

(1) Even though, according to the definition contained in guideline 2.6.1, an objection is a unilateral statement, it is perfectly possible for a number of States and/or a number of

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[1100] *Ibid.*, chap. XXI.2 – date of signature: 9 September 1958; date of objection: 6 November 1959; date of ratification: 14 March 1960.

[1101] *Ibid.*, chap. VI.19 – date of signature: 22 May 1989; date of objection: 27 December 1989; date of ratification: 25 October 1995.

[1102] *Summary of Practice of the Secretary-General ...*, footnote 75 above, para. 214.

[1103] *I.C.J. Reports 1951*, footnote 604 above, p. 30, para. III of the operative part.

[1104] *Ibid.*

international organizations to formulate an objection jointly. Practice in this area is not highly developed; it is not, however, non-existent.

(2) In the context of regional organizations, and in particular the Council of Europe, member States endeavour to coordinate and harmonize, to the extent possible, their reactions and objections to reservations. Even though these States continue to formulate objections individually, they coordinate not only on the appropriateness but also on the wording of objections.[1105] Technically, however, these objections remain unilateral declarations on the part of each author State.

(3) Yet it is also possible to cite cases in which States and international organizations have formulated objections in a truly joint fashion. For example, the European Community and its (at that time) nine member States objected, via a single instrument, to the "declarations" formulated by Bulgaria and the German Democratic Republic regarding article 52, paragraph 3, of the Customs Convention on the International Transport of Goods under Cover of TIR Carnets of 4 November 1975, which offers customs unions and economic unions the possibility of becoming contracting parties.[1106] The European Community also formulated a number of objections "on behalf of the European Economic Community and of its member States".[1107]

(4) It seemed to the Commission that there was no fault to be found with the joint formulation of an objection by several States or international organizations: it is difficult to imagine what might prevent them from doing jointly what they can doubtless do individually and under the same terms. Such flexibility is all the more desirable in that, given the growing number of common markets and customs and economic unions, precedents consisting of the objections or joint interpretative declarations cited above are likely to increase, as these institutions often exercise shared competence with their member States. Yet it would be quite unnatural to require that the latter should act separately from the institutions to which they belong. Thus, from a technical standpoint there is nothing to prevent the joint formulation of an objection, but this in no way affects the unilateral nature of the objection.

2.6.5 Form of objections

An objection must be formulated in writing.

Commentary

(1) Pursuant to article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions, an objection to a reservation "must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty".

[1105] See, for example, the objections of certain States members of the Council of Europe to the International Convention for the Suppression of Terrorist Bombings of 1997 (*Multilateral Treaties* ..., chap. XVIII.9) or to the International Convention for the Suppression of the Financing of Terrorism of 1999 (*ibid.*, chap. XVIII.11).

[1106] *Ibid.*, chap. XI-A.16.

[1107] See, for example, the objection to the declaration made by the USSR in respect of the Wheat Trade Convention of 1986 (*Multilateral Treaties* ..., chap. XIX.26) and the identical objection to the declaration made by the USSR in respect of the Tropical Timber Agreement of 1983 (*ibid.*, chap. XIX.28). In the same vein, see the practice followed at the Council of Europe since 2002 with respect to reservations to counter-terrorism conventions (para. (2) above).

(2) As is the case for reservations,[1108] the requirement that an objection to a reservation must be formulated in writing was never called into question but was presented as self-evident in the debates in the Commission and at the Vienna Conferences. Already in his first report Sir Humphrey Waldock, the first special rapporteur to draft provisions on objections, provided, in paragraph 2 (a) of draft article 19, that "an objection to a reservation shall be formulated in writing ...",[1109] without making this formal requirement the subject of commentary.[1110] Although the procedural guidelines were comprehensively revised by the Special Rapporteur in the light of the comments of two Governments suggesting that "some simplification of the procedural provisions"[1111] was desirable, the requirement of a written formulation for an objection to a reservation was always explicitly stipulated:

- In article 19, paragraph 5, adopted on first reading (1962): "An objection to a reservation shall be formulated in writing and shall be notified";[1112]
- In article 20, paragraph 5, proposed by the Special Rapporteur in his fourth report (1965): "An objection to a reservation must be in writing";[1113]
- In article 20, paragraph 1, adopted on second reading (1965): "A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the other contracting States".[1114]
- In article 18, paragraph 1, as ultimately adopted by the Commission in 1966: "A reservation, an express acceptance of a reservation, and an objection to a reservation must be formulated in writing and communicated to the other States entitled to become parties to the treaty".[1115]

Nor was the written form called into question at the 1968–1969 Vienna Conference. On the contrary, all proposed amendments to the procedure in question retained the requirement that an objection to a reservation must be formulated in writing.[1116]

(3) That objections must be in written form is well established. Notification, another procedural requirement applicable to objections (by virtue of article 23, paragraph 1, of the Vienna Conventions), requires a written document; oral communication alone cannot be filed or registered with the depositary of the treaty or communicated to the other States concerned. Furthermore, considerations of legal security justify and call for the written form. One must not forget that an objection has significant legal effects on the opposability of a reservation, the applicability of the provisions of a treaty as between the reserving State and the objecting State (art. 21, para. 3, of the Vienna Conventions) and the entry into force of the treaty (art. 20, para. 4). In addition, an objection reverses the presumption of acceptance arising from article 20, paragraph 5, of the Vienna Conventions, and written form is an important means of

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[1108] See guideline 2.1.1 (Form of reservations) and commentary thereto.

[1109] First report (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 62.

[1110] *Ibid.*, p. 68, para. (22) of the commentary to draft article 19, which simply refers the reader to the commentary to draft article 17 (*ibid.*, p. 66, para. (11)).

[1111] These were the Governments of Sweden and Denmark. See Sir Humphrey Waldock, fourth report (A/CN.4/177), *Yearbook ... 1965*, vol. II, pp. 46–47 and p. 53, para. 13.

[1112] *Yearbook ... 1962*, vol. II, p. 176.

[1113] Fourth report (A/CN.4/177), *Yearbook ... 1965*, vol. II, p. 53.

[1114] *Yearbook ... 1965*, vol. II, p. 162.

[1115] *Yearbook ... 1966*, vol. II, p. 208.

[1116] See the Spanish amendment: "A reservation, an acceptance of a reservation, and an objection to a reservation must be formulated in writing and duly communicated by the reserving, accepting or objecting State to the other States which are parties, or are entitled to become parties, to the treaty" (A/CONF.39/C.1/L.149, in *Documents of the Conference*, footnote 54 above, p. 150).

proving whether a State did indeed express an objection to a reservation during the period of time prescribed by this provision or whether, by default, it must be considered as having accepted the reservation.

(4) Guideline 2.6.5 therefore confines itself to reproducing the requirement of written form for the objections referred to in the first part of article 23, paragraph 1, of the Vienna Convention, and parallels guideline 2.1.1 relating to the written form of reservations.

2.6.6 Right to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation

A State or an international organization that formulates an objection to a reservation may oppose the entry into force of the treaty as between itself and the author of the reservation.

Commentary

(1) The right to formulate objections irrespective of the permissibility (or impermissibility) of the reservation, established in guideline 2.6.2, also encompasses the right to oppose the entry into force of the treaty as between the reserving State or international organization, on the one hand, and the author of the objection, on the other. This possibility has its origin in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions, which specify the effects of an objection.

(2) Arriving at those provisions, in particular article 20, paragraph 4 (b), of the 1969 Convention, proved difficult. The Commission's early special rapporteurs, staunch supporters of the system of unanimity, had little interest in objections, the effects of which were, in their view, purely mechanical:[1117] it seemed self-evident to them that an objection prevented the reserving State from becoming a party to the treaty.[1118] Even though he came to support a more flexible system, Sir Humphrey Waldock still adhered to that view in 1962, as demonstrated by the draft article 19, paragraph 4 (c), presented in his first report on the law of treaties, which stated that "the objections shall preclude the entry into force of the treaty as between the objecting and the reserving States".[1119]

(3) The members of the Commission,[1120] including the Special Rapporteur,[1121] however, ultimately abandoned that categorical approach in favour of a simple presumption in order to bring the wording of this provision more into line with the 1951 advisory opinion of the International Court of Justice, which stated:

> "As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it *will or will not*, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention."[1122]

[1117] See the commentary to guideline 4.3.1.

[1118] Paul Reuter, *Introduction au droit des traités*, 2nd ed. (Paris, Presse Universitaire de France, 1985), p. 75, para. 132.

[1119] *Yearbook ... 1962*, vol. II., p. 62.

[1120] See, in particular, Mr. Tunkin (*Yearbook ... 1962*, vol. I, 653rd meeting, p. 156, para. 26, and 654th meeting, pp. 161–162, para. 11), Mr. Rosenne (*ibid.*, 653rd meeting, pp. 156–157, para. 30), Mr. Jiménez de Aréchaga (*ibid.*, p. 158, para. 48), Mr. de Luna (*ibid.*, p. 160, para. 66) and Mr. Yasseen (*ibid.*, 654th meeting, p. 161, para. 6).

[1121] *Ibid.*, pp. 162 and 163, paras. 17 and 29.

[1122] Advisory opinion cited in footnote 604 above, p. 26 (italics added).

(4) Strictly aligning themselves with this position, the members of the Commission introduced a simple presumption in favour of the non-entry into force of the treaty as between the reserving State and the objecting State and initially limited the possibility of opposing the treaty's entry into force to cases where the reservation was contrary to the object and purpose of the treaty.[1123] Draft article 20, paragraph 2 (b), adopted on first reading, therefore provided as follows:

> "An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State."[1124]

(5) Once the possibility of making an objection is no longer linked to the criterion of compatibility with the object and purpose of the treaty,[1125] the right of the objecting State to oppose the treaty's entry into force in its relations with the reserving State becomes unconditional. The objecting State may, therefore, exclude all treaty relations between itself and the reserving State for any reason. The wording ultimately retained by the Commission went so far as to make this effect automatic: an objection (whatever the reason) precluded the entry into force of the treaty, unless the State concerned expressed its contrary intention.[1126] During the Vienna Conference, the thrust of that presumption was reversed, not without heated debate, in favour of the entry into force of the treaty as between the objecting State and the reserving State.[1127]

(6) As open to criticism as this new approach may seem, the fact remains that the author of the objection is still free to oppose the entry into force of the treaty in its relations with the author of the reservation. The reversal of the presumption simply requires the author of the objection to make an express declaration to that effect, even though it remains completely free regarding its reasons for making it.

(7) In practice, States have been curiously eager to declare expressly that their objections do *not* prevent the treaty from entering into force *vis-à-vis* the reserving State, even though, by

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[1123] See paragraph (4) of the commentary to guideline 2.6.2, above.

[1124] *Yearbook ... 1962*, vol. II, p. 176 and p. 181, para. (23) of the commentary.

[1125] On this point, see the explanation given in paragraphs (5) to (7) of the commentary to guideline 2.6.2 above.

[1126] Draft article 17, paragraph 4 (b), adopted on second reading, provided as follows: "An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State" (Report of the International Law Commission on the work of its eighteenth session, *Yearbook ... 1966*, vol. II, p. 202).

[1127] The question had already been raised during the discussion of the draft articles adopted on first reading by the members of the International Law Commission and by the Czechoslovak and Romanian delegations in the Sixth Committee (Sir Humphrey Waldock, fourth report (A/CN.4/177), footnote 1113 above, pp. 48–49). The idea of reversing the presumption had been advocated by a number of Commission members (Mr. Tunkin (*Yearbook ... 1965*, vol. I, 799th meeting, para. 39) and Mr. Lachs (*ibid.*, 813th meeting, para. 62)). Nevertheless, the proposals made in this regard by Czechoslovakia (A/CONF.39/C.1/L.85, in *Documents of the Conference*, A/CONF.39/11/Add.2, footnote 54 above, p. 135), Syria (A/CONF.39/C.1/L.94, *ibid.*) and the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.115, *ibid.*, p. 133) were rejected by the Conference in 1968 (*First Session, Summary records* (A/CONF.39/11), footnote 35 above, 25th meeting, paras. 35 ff.). It was only in 1969 that a new Soviet amendment in this regard (A/CONF.39/L.3, in *Documents of the Conference*, footnote 54 above, pp. 265–266) was finally adopted by 49 votes to 21, with 30 abstentions (*Second Session, Summary records*, footnote 332 above, 10th plenary meeting, para. 79).

virtue of the presumption contained in article 20, paragraph 4 (b), of the Vienna Conventions, that would automatically be the case with regard to an objection to a permissible reservation.[1128] Nor is this practice linked to the reason for the objection, since States make objections with minimum effect (specifically stating that the treaty will enter into force in their relations with the reserving State) even to reservations that they deem incompatible with the object and purpose of the treaty.[1129] There are, however, some examples of objections in which States specifically declare that their objection does prevent the treaty from entering into force in their relations with the reserving State.[1130] Such cases, though rare,[1131] show that States can and do make such objections when they see fit.

(8) It follows that the right to formulate an objection for any reason whatsoever also implies that the objecting State or international organization is free to oppose the entry into force of the treaty in its relations with the reserving State or organization. The author of the objection thus has considerable latitude in specifying the effect of its objection on the entry

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[1128] Concerning invalid reservations, see guidelines 4.5.2 and 4.5.3.

[1129] See Belgium's objections to the Egyptian and Cambodian reservations to the Vienna Convention on Diplomatic Relations (*Multilateral Treaties* ..., chap. III.3) or the objections of the Federal Republic of Germany to several reservations to the same Convention (*ibid.*). It is, however, interesting to note that, even though Germany considered all the reservations in question as "incompatible with the letter and spirit of the Convention", the German Government declared for only some objections that they did not prevent the entry into force of the treaty as between Germany and the reserving States; it did not take a position on the other cases. Many examples can be found in the objections to the reservations formulated to the International Covenant on Civil and Political Rights, in particular the objections that were formulated to the reservation of the United States of America to article 6 of the Covenant by Belgium, Denmark, Finland, France, Italy, the Netherlands, Norway, Portugal, Spain and Sweden (*ibid.*, chap. IV.4). All these States considered the reservation to be incompatible with the object and purpose of the Covenant, but nonetheless did not oppose its entry into force in their relations with the United States. Only Germany remained silent regarding the entry into force of the Covenant, despite its objection to the reservation (*ibid.*). The phenomenon is not, however, limited to human rights treaties: see, for example, the objections of Austria, France, Germany and Italy to Viet Nam's reservation to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (*ibid.*, chap. VI.19) or the objections of States members of the Council of Europe to the reservations to the International Convention for the Suppression of Terrorist Bombings of 1997 (*ibid.*, chap. XVIII.9) or to the International Convention for the Suppression of the Financing of Terrorism of 1999 (*ibid.*).

[1130] See, for example, the objections of Israel, Italy and the United Kingdom to the reservations formulated by Burundi to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973 (*Multilateral Treaties* ..., chap. XVIII.7), the objections of France and Italy to the United States reservation to the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (*ibid.*, chap. XI.B.22) or the objections of the United Kingdom to the Syrian and Vietnamese reservations and the objections of New Zealand to the Syrian reservation to the Vienna Convention on the Law of Treaties (*ibid.*, chap. XXIII.1).

[1131] This is not to imply that maximum-effect objections accompanied by the declaration provided for in article 20, paragraph 4 (b), are a type of objection that is disappearing, as is suggested by R. Riquelme Cortado (footnote 150 above, p. 283). It has been argued that the thrust of the presumption retained at the Vienna Conference (in favour of the entry into force of the treaty) and political considerations may explain the reluctance of States to resort to maximum-effect objections (see Catherine Redgwell, "Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties", *British Year Book of International Law*, 1993, p. 267). See, however, the explanations provided by States to the question posed by the Commission on this point (Eleventh report on reservations to treaties (A/CN.4/574), paras. 33–38, in particular paragraph 37).

into force of the treaty as between itself and the author of the reservation;[1132] in any case, in order to oppose the entry into force of the treaty in its relations with the author of the reservation, the author of the objection need only accompany its objection with an expression of that intention, pursuant to guideline 2.6.7, without having to state the reasons for its decision. The limitations on that right are explained in the part of the Guide to Practice that deals with the effects of reservations.[1133]

(9) As was explained in connection with guideline 2.6.2,[1134] the Commission considered it unnecessary in guideline 2.6.6 to state the self-evident proviso that the right of the author of the objection to oppose the entry into force of the treaty as between itself and the author of the reservation must be exercised in accordance with the conditions of form and procedure set out elsewhere in the Guide to Practice.

2.6.7 Expression of intention to preclude the entry into force of the treaty

When a State or an international organization formulating an objection to a reservation intends to preclude the entry into force of the treaty as between itself and the reserving State or international organization, it shall definitely express its intention before the treaty would otherwise enter into force between them.

Commentary

(1) As article 20, paragraph 4 (b), of the Vienna Conventions shows, a State or an international organization objecting to a reservation may oppose the entry into force of a treaty as between itself and the author of the reservation. In order for this to be so, according to the same provision, that intent must still be "definitely expressed by the objecting State or organization". Following the reversal of the presumption regarding the effects of the objection on the entry into force of the treaty as between the reserving State and the objecting State decided at the 1969 Vienna Conference,[1135] a clear and unequivocal statement is necessary in order to preclude the entry into force of the treaty in relations between the two States.[1136] This is how article 20, paragraph 4 (b), of the Vienna Conventions, on which the text of guideline 2.6.7 is largely based, should be understood.

(2) The objection of the Netherlands to the reservations to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide certainly meets the requirement of definite expression; it states that "the Government of the Kingdom of the Netherlands ... does not deem any State which has made or will make such reservation a party to the Convention".[1137] France also very clearly expressed such an intention regarding the reservation of the United States of America to the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be Used for such Carriage (ATP) by declaring that it would not "be bound by the ATP Agreement in its relations with the United States of America".[1138] Similarly, the United Kingdom stated in its objection to the

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[1132] See also guideline 4.3.5 and commentary thereto.

[1133] See in particular guidelines 3.4.2 and 4.3.5 and commentary thereto.

[1134] See paragraph (12) of the commentary to guideline 2.6.2 above.

[1135] See above, para. 5 of the commentary to guideline 2.6.6.

[1136] See R. Baratta, footnote 701 above, p. 352. The author states: "There is no doubt that, in order for the expected consequence of the rule regarding a qualified objection to be produced, the author must state its intention to that effect." See, however, paragraph (6) below.

[1137] *Multilateral Treaties* ..., chap. IV.1.

[1138] *Ibid.*, chap. XI.B.22. See also the objection of Italy (*ibid.*).

reservation of the Syrian Arab Republic to the Vienna Convention on the Law of Treaties that it did "not accept the entry into force of the Convention as between the United Kingdom and Syria".[1139]

(3) On the other hand, the mere fact that the reason for the objection is that the reservation is considered incompatible with the object and purpose of the treaty is not sufficient to exclude the entry into force of the treaty between the author of the objection and the author of the reservation. Practice is indisputable in this regard, since States quite frequently base their objections on such incompatibility, all the while clarifying that the finding does not prevent the treaty from entering into force as between them and the author of the reservation.[1140]

(4) Neither the Vienna Conventions nor the *travaux préparatoires* thereto give any useful indication regarding the time at which the objecting State or international organization must clearly express its intention to oppose the entry into force of the treaty as between itself and the reserving State. It is nevertheless possible to proceed by deduction. According to the presumption of article 20, paragraph 4 (b), of the Vienna Conventions, whereby an objection does not preclude the entry into force of a treaty in treaty relations between an objecting State or international organization and the reserving State or international organization unless the contrary is expressly stated, an objection that is not accompanied by such a declaration results in the treaty entering into force, subject to article 21, paragraph 3, of the Vienna Conventions concerning the effect of a reservation on relations between the two parties. If the objecting State or organization expressed a different intention in a subsequent declaration, it would undermine its legal security.

(5) However, this is the case only if the treaty actually enters into force in relations between the two States or international organizations concerned. It may also happen that, although the author of the objection has not ruled out this possibility at the time of formulating the objection, the treaty does not enter into force immediately for other reasons.[1141] In such cases, the Commission considered that there was no reason to prohibit the author of the objection from expressing the intention to preclude the entry into force of the treaty at a later date; such a solution is particularly necessary in situations where a long period of time may elapse between the formulation of the initial objection and the expression of consent to be bound by the treaty by the reserving State or international organization or by the author of the objection. Accordingly, while excluding the possibility that a declaration "maximizing" the scope of the objection can be made after the entry into force of the treaty between the author of the reservation and the author of the objection, the Commission made it clear that the intention to preclude the entry into force of the treaty must be expressed "before the treaty would otherwise enter into force" between them, without making expression of the will to oppose the entry into force of the treaty in all cases at the time the objection is formulated a prerequisite.

(6) Nevertheless, expression of the intention to preclude the entry into force of a treaty by the author of the objection or the absence thereof does not in any way prejudge the question of whether the treaty actually enters into force between the reserving State or international organization and the State or international organization that made an objection. This question concerns the combined legal effects of a reservation and the reactions it has prompted, and is

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[1139] *Ibid.*, chap. XXIII.1. See also the objection of the United Kingdom to the reservation of Viet Nam (*ibid.*).

[1140] See footnote 1129 above.

[1141] Insufficient number of ratifications or accessions, additional time provided under the provisions of the treaty itself.

to some extent separate from that of the intention of the States or international organizations concerned.

2.6.8 Procedure for the formulation of objections

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to objections.

Commentary

(1) The procedural rules concerning the formulation of objections are not notably different from those that apply to the formulation of reservations. This is perhaps the reason why the International Law Commission apparently did not pay much attention to these issues during the *travaux préparatoires* for the 1969 Vienna Convention.

(2) This lack of interest can easily be explained in the case of the special rapporteurs who advocated the traditional system of unanimity, namely James Brierly, Hersch Lauterpacht and Gerald Fitzmaurice.[1142] While it was only logical, in their view, that an acceptance, which is at the heart of the traditional system of unanimity, should be provided with a legal framework, particularly where its temporal aspect was concerned, an objection, which they saw simply as a refusal of acceptance that prevented unanimity from taking place and thus preventing the reserving State from becoming a party to the instrument, did not seem to warrant specific consideration.

(3) Sir Humphrey Waldock's first report, which introduced the "flexible" system in which objections play a role that is, if not more important, then at least more ambiguous, contained an entire draft article on procedural issues relating to the formulation of objections.[1143]

[1142] Even though Lauterpacht's proposals *de lege ferenda* envisaged objections, the Special Rapporteur did not consider it necessary to set out the procedure that should be followed when formulating them. See the alternative drafts of article 9, Hersch Lauterpacht, [First] Report on the law of treaties, (A/CN.4/63), *Yearbook ... 1953*, vol. II, pp. 91–92.

[1143] This draft article 19 contained the following provision:

> "2. (*a*) An objection to a reservation shall be formulated in writing by the competent authority of the objecting State or by a representative of the State duly authorized for that purpose.
>
> (*b*) The objection shall be communicated to the reserving State and to all other States which are or are entitled to become parties to the treaty, in accordance with the procedure, if any, prescribed in the treaty for such communications.
>
> (*c*) If no procedure has been prescribed in the treaty but the treaty designates a depositary of the instruments relating to the treaty, then the lodging of the objection shall be communicated to the depositary whose duty it shall be:
>
> (i) To transmit the text of the objection to the reserving State and to all other States which are or are entitled to become parties to the treaty; and
>
> (ii) To draw the attention of the reserving State and the other States concerned to any provisions in the treaty relating to objections to reservations.
>
> 3. (*a*) In the case of a plurilateral or multilateral treaty, an objection to a reservation shall not be effective unless it has been lodged before the expiry of twelve calendar months from the date when the reservation was formally communicated to the objecting State; provided that, in the case of a multilateral treaty, an objection by a State which at the time of such communication was not a party to the treaty shall nevertheless be effective if subsequently lodged when the State executes the act or acts necessary to enable it to become a party to the treaty.

Despite the very detailed nature of this provision, the report limits itself to a very brief commentary, indicating that "the provisions of this article are for the most part a reflex of provisions contained in [the articles on the power to formulate and withdraw reservations (art. 17) and on consent to reservations and its effects (art. 18)] and do not therefore need further explanation".[1144]

(4) After a major reworking of the draft articles on acceptance and objection initially proposed by the Special Rapporteur,[1145] only draft article 18, paragraph 5, presented by the Drafting Committee in 1962, deals with the formulation and the notification of an objection,[1146] a provision that, in the view of the Commission, "do[es] not appear to require comment".[1147] That lack of interest continued into 1965, when the draft received its second reading. And even though objections found a place in the new draft article 20 devoted entirely to questions of procedure, the Special Rapporteur still did not consider it appropriate to comment further on those provisions.[1148]

(5) The desirability of parallel procedural rules for the formulation, notification and communication of reservations, on the one hand, and of objections, on the other, was stressed throughout the debate in the Commission and was finally reflected in article 23, paragraph 1, of the 1969 Vienna Convention, which aligns the procedure for formulating an express acceptance or objection with the procedure applicable to reservations. In 1965, Mr. Castrén rightly observed:

> "Paragraph 5 [of draft article 20, which, considerably shortened and simplified, was the source for article 23, paragraph 1] laid down word for word precisely the same procedural rules for objections to a reservation as those applicable under paragraph 1 to the proposal and notification of reservations. Preferably, therefore, the two paragraphs should be amalgamated or else paragraph 5 should say simply that the provisions of paragraph 1 applied also to objections to a reservation."[1149]

(*b*) In the case of a plurilateral treaty, an objection by a State which has not yet become a party to the treaty, either actual or presumptive, shall:

(i) Cease to have effect, if the objecting State shall not itself have executed a definitive act of participation in the treaty within a period of twelve months from the date when the objection was lodged;

(ii) Be of no effect, if the treaty is in force and four years have already elapsed since the adoption of its text.

..."

(First report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 62).

[1144] *Ibid.*, p. 68, para. (22) of the commentary.

[1145] The only explanation that can be found in the work of the Commission for merging the draft articles initially proposed by Sir Humphrey Waldock is found in his presentation of the report of the Drafting Committee at the 663rd meeting of the Commission. On that occasion, the Special Rapporteur stated that "the new article 18 covered both acceptance of and objection to reservations; the contents of the two former articles 18 and 19 had been considerably reduced in length without, however, leaving out anything of substance" (*Yearbook ... 1962*, vol. I, 663rd meeting, para. 36).

[1146] *Yearbook ... 1962*, vol. I, 668th meeting, para. 30. See also draft article 19, paragraph 5, adopted on first reading, *Yearbook ... 1962*, vol. II, p. 176.

[1147] *Yearbook ... 1962*, vol. II, p. 180, para. (18) of the commentary.

[1148] Fourth report on the law of treaties (A/CN.4/177), *Yearbook ... 1965*, vol. II, pp. 53–54, para. 19.

[1149] *Yearbook ... 1965*, vol. I, 799th meeting, para. 53.

(6) Accordingly, the Commission considered it prudent simply to take note in the Guide to Practice of this procedural parallelism between the formulation of reservations and the formulation of objections. It is particularly important to note that the requirement of a marked formalism that is a consequence of these similarities between the procedure for the formulation of objections and the procedure for the formulation of reservations is justified by the highly significant effects that an objection may have on the reservation and its application as well as on the entry into force and the application of the treaty itself.[1150]

(7) This is particularly true of the rules applicable to reservations with regard to the authorities competent to formulate reservations at the international level and the consequences (or rather the absence of consequences) of the violation of rules of internal law when formulating reservations, the rules relating to the notification and communication of reservations and the rules relating to the functions of the depositary in this area. These rules would seem to be transposable *mutatis mutandis* to the formulation of objections. Rather than reproducing guidelines 2.1.3 (Representation for the purpose of formulating a reservation at the international level), 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations), 2.1.5 (Communication of reservations), 2.1.6 (Procedure for communication of reservations) and 2.1.7 (Functions of depositaries) by simply replacing "reservation" with "objection" in the text of the guidelines, the Commission considered it prudent to make a general reference in the texts of these guidelines,[1151] which apply *mutatis mutandis* to objections.

2.6.9 Statement of reasons for objections

An objection should, to the extent possible, indicate the reasons why it is being formulated.

Commentary

(1) Neither of the Vienna Conventions contains a provision requiring States to give the reasons for their objection to a reservation. Furthermore, notwithstanding the link initially established between an objection, on the one hand, and the compatibility of the reservation with the object and purpose of the treaty, on the other hand,[1152] Sir Humphrey Waldock never at any point envisaged requiring a statement of the reasons for an objection. This is regrettable.

(2) Under the Vienna Convention regime, the right to formulate an objection to a reservation is admittedly very broad, and a State or international organization may object to a reservation for any reason whatsoever, irrespective of the permissibility of the reservation: "No State can be bound by contractual obligations it does not consider suitable."[1153] Furthermore, during discussions in the Sixth Committee of the General Assembly, several States indicated that quite often the reasons a State has for formulating an objection are purely

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[1150] See article 20, paragraph 4 (b), and article 23, paragraph 3, of the Vienna Conventions.

[1151] The Commission proceeded in the same manner in guidelines 1.6.2 (cross reference to guidelines 1.2 and 1.4), 2.4.5 (cross reference to guidelines 2.1.5, 2.1.6 and 2.1.7) and 2.5.6 (cross reference to guidelines 2.1.5, 2.1.6 and 2.1.7).

[1152] See paragraph (4) of the commentary to guideline 2.6.2.

[1153] C. Tomuschat, foonote 1084 above, p. 466.

political.[1154] When this is the case, stating reasons can unnecessarily place the objecting State or international organization in an awkward position, while gaining nothing for the author of the objection or the other States or international organizations concerned.

(3) Yet the issue is different where a State or international organization objects to a reservation because it considers it invalid (regardless of the reason for and merits of this position). Leaving aside the question as to whether there may be a legal obligation[1155] for States to object to reservations that are incompatible with the object and purpose of a treaty, it is nevertheless the case that in a "flexible" treaty regime objections play a significant role in the determination of the permissibility of a reservation. In the absence of a mechanism for monitoring reservations, the onus is on States and international organizations to express, including by means of objections, their view, which is necessarily subjective, on the permissibility of a given reservation.[1156] Such a function can only be fulfilled, however, if objections are motivated by considerations relating to the non-permissibility of the reservation in question. If only for this reason, it would seem reasonable to indicate, insofar as possible, the reasons for an objection. It is difficult to see why an objection formulated for purely political reasons should be taken into account when determining whether a reservation meets the requirements of article 19 of the Vienna Conventions.

(4) In addition, indicating the reasons for an objection not only allows a reserving State or international organization to understand the views of the other States and international organizations concerned regarding the impermissibility of the reservation but, like the statement of reasons for the reservation itself,[1157] provides important evidence to the monitoring bodies called on to determine whether a reservation is in conformity with the treaty. Thus, in the *Loizidou* case, the European Court of Human Rights found its conclusions

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[1154] See, for example, the statement by the United States representative in the Sixth Committee during the fifty-eighth session of the General Assembly: "Practice demonstrated that States and international organizations objected to reservations for a variety of reasons, often political rather than legal in nature, and with different intentions" (A/C.6/58/SR.20, para. 9). During the sixtieth session, the representative of the Netherlands stated that "in the current system, the political aspect of an objection, namely, the view expressed by the objecting State on the desirability of a reservation, played a central role, and the legal effects of such an objection were becoming increasingly peripheral" (A/C.6/60/SR.14, para. 31); regarding the political aspect of an objection, see Portugal (A/C.6/60/SR.16, para. 44). See also the Inter-American Court of Human Rights, Separate Opinion of Judge A.A. Cançado Trinidade in the case *Caesar v. Trinidad and Tobago*, Judgment of 11 March 2005, Series C, No. 123, para. 24.

[1155] The Netherlands observed that "States parties, as guardians of a particular treaty, appeared to have a moral, if not legal, obligation to object to a reservation that was contrary to the object and purpose of that treaty" (A/C.6/60/SR.16, para. 29). According to this line of reasoning, "a party is required to give effect to its undertakings in good faith and that would preclude it from accepting a reservation inconsistent with the object and purpose of the treaty" (Françoise Hampson, Final working paper on reservations to human rights treaties (E/CN.4/Sub.2/2004/42), para. 24); Ms. Hampson observed, however, that there did not seem to be a general obligation to formulate an objection to reservations incompatible with the object and purpose of the treaty (*ibid.*, para. 30).

[1156] Some treaty regimes go so far as to rely on the number of objections in order to determine the admissibility of a reservation. See, for example, article 20, paragraph 2, of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, which states: "A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. *A reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it*" (emphasis added).

[1157] See guideline 2.1.2 and paragraphs (4) to (6) of the commentary thereto.

regarding the impermissibility of the reservation formulated by Turkey regarding its declaration of acceptance of the Court's jurisdiction confirmed in the declarations and objections made by other States parties to the European Convention on Human Rights.[1158] Similarly, in the working paper she submitted to the Sub-Commission on the Promotion and Protection of Human Rights in 2004, Ms. Hampson stated that "in order for a treaty body to discharge its role, it will need to examine, amongst other materials, the practice of the parties to the treaty in question with regard to reservations and objections".[1159] The Human Rights Committee itself, in its general comment No. 24, demonstrates deep mistrust with regard to the practice of States concerning objections and with regard to the conclusions that one may draw from it in assessing the permissibility of a reservation, but nevertheless states that "an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant".[1160]

(5) Moreover, State practice shows that States often indicate in their objections not only that they consider the reservation in question to be contrary to the object and purpose of the treaty but also, in more or less detail, how and why they reached that conclusion. At the sixtieth session of the General Assembly, the representative of Italy to the Sixth Committee expressed the view that the Commission should encourage States to make use of the formulas set forth in article 19 of the Vienna Convention, with a view to clarifying their objections.[1161]

(6) In the light of these considerations and notwithstanding the absence of an obligation in the Vienna regime to give the reasons for objections, the Commission considered it useful to include in the Guide to Practice guideline 2.6.9, which encourages States and international organizations to expand and develop the practice of stating reasons. It must be clearly understood, however, that such a provision is only a recommendation, a guideline for State practice, and that it does not in any way codify an established rule of international law.

(7) Guideline 2.6.9 is worded along the lines of guideline 2.1.2, concerning the statement of reasons for reservations, but does not go any further than that guideline in specifying the point at which the reasons for an objection must be given. Since the same causes produce the same effects,[1162] it would nevertheless seem desirable for the objecting State or international organization to give the reasons for its opposition to the reservation in the instrument notifying the objection.

2.6.10 Non-requirement of confirmation of an objection formulated prior to formal confirmation of a reservation

An objection to a reservation formulated by a State or an international organization prior to confirmation of the reservation in accordance with guideline 2.2.1 does not itself require confirmation.

[1158] *Loizidou v. Turkey, Preliminary Objections, Judgment of 23 March 1995, Report of Judgments and Decisions of the European Court of Human Rights*, Series A, vol. 310, pp. 28–29, para. 81. See also the statement of the representative of Sweden on behalf of the Nordic countries in the Sixth Committee, 26 October 2005 (A/C.6/60/SR.14, para. 22).

[1159] Final working paper on reservations to human rights treaties (E/CN.4/Sub.2/2004/42, para. 28); see, more generally, paragraphs 21–35 of this study.

[1160] CCPR/C/21/Rev.1/Add.6, para. 17.

[1161] 28 October 2005 (A/C.6/60/SR.16, para. 20).

[1162] See paragraph (8) of the commentary to guideline 2.1.2.

Commentary

(1) While article 23, paragraph 2, of the Vienna Conventions requires formal confirmation of a reservation when the reserving State or international organization expresses its consent to be bound by the treaty,[1163] objections do not need confirmation. Article 23, paragraph 3, of the Vienna Conventions provides:

> "An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation."

Guideline 2.6.10 reproduces some of the terms of this provision with the necessary editorial amendments to limit its scope to objections only.[1164]

(2) The provision contained in article 23, paragraph 3, of the 1969 Vienna Convention was included only at a very late stage of the *travaux préparatoires* for the Convention. The early draft articles relating to the procedure applicable to the formulation of objections did not refer to cases where an objection might be made to a reservation that had yet to be formally confirmed. It was not until 1966 that the non-requirement of confirmation of an objection was expressed in draft article 18, paragraph 3, adopted on second reading in 1966,[1165] without explanation or illustration; however, it was presented at that time as *lex ferenda*.[1166]

(3) This is a common-sense rule: the formulation of the reservation concerns all contracting States and contracting organizations as well as all States and international organizations entitled to become parties; acceptances and objections affect primarily the bilateral relations between the author of the reservation and each of the accepting or objecting States or organizations. The reservation is an "offer" addressed to all contracting States and contracting organizations, which may accept or reject it; it is the reserving State or organization that endangers the integrity of the treaty and risks reducing it to a series of bilateral relations. On the other hand, it is unimportant whether the acceptance or objection is made before or after confirmation of the reservation: what is important is that the author of the reservation be aware of its partners' intentions[1167] which is the case if the communication procedure established in article 23, paragraph 1, has been followed.

(4) State practice regarding the confirmation of objections is sparse and inconsistent: sometimes States confirm their previous objections once the reserving State has itself confirmed its reservation, but at other times they refrain from doing so.[1168] Although the

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[1163] See also guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty) and commentary thereto.

[1164] Concerning the non-requirement of confirmation of an acceptance formulated prior to the formal confirmation of a reservation, see guideline 2.8.6 and commentary thereto.

[1165] *Yearbook* ... *1966*, vol. II, p. 208.

[1166] "The Commission did not consider that an objection to a reservation made previously to the latter's confirmation would need to be reiterated after that event" (*ibid.*, para. (5) of the commentary).

[1167] In its advisory opinion of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice described the objection made by a signatory as a "warning" addressed to the author of the reservation (*I.C.J. Reports 1951*; footnote 604 above, p. 29).

[1168] For example, Australia and Ecuador did not confirm their objections to the reservations formulated at the time of the signing of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide by the Byelorussian SSR, Czechoslovakia, Ukraine and the USSR when those States ratified that Convention while confirming their reservations (*Multilateral Treaties* ... chap. IV.1). Similarly, Ireland and Portugal did not confirm the objections they made to the reservation formulated by Turkey at the time of the signing of the 1989 Convention on the Rights of the Child when Turkey confirmed its reservation in its instrument of ratification (*ibid.*, chap. IV.11).

latter approach seems to be more usual, the fact that these confirmations exist does not invalidate the positive quality of the rule laid down in article 23, paragraph 3: these are precautionary measures that are by no means dictated by a sense of legal obligation (*opinio juris*).

2.6.11 Confirmation of an objection formulated prior to the expression of consent to be bound by a treaty

An objection formulated prior to the expression of consent to be bound by the treaty does not need to be formally confirmed by the objecting State or international organization at the time it expresses its consent to be bound if that State or that organization was a signatory to the treaty when it formulated the objection; it must be confirmed if the State or international organization had not signed the treaty.

Commentary

(1) Article 23, paragraph 3, of the Vienna Conventions does not, however, answer the question of whether an objection by a State or an international organization that, when formulating it, had yet to express its consent to being bound by the treaty must subsequently be confirmed if it is to produce the effects envisaged. Although Sir Humphrey Waldock did not overlook the possibility that an objection might be formulated by signatory States or by States only entitled to become parties to the treaty,[1169] the question of the subsequent confirmation of such a reservation was never raised.[1170] A proposal to that end made by Poland at the Vienna Conference[1171] was not considered. The Convention therefore has a gap that guideline 2.6.11 endeavours to fill.

(2) State practice in this regard is all but non-existent. One of the rare examples is provided by the objections formulated by the United States of America to a number of reservations to the 1969 Vienna Convention itself.[1172] In its objection to the Syrian reservation, the United States — which has yet to express its consent to be bound by the Convention — specified that it:

> "intends, at such time as it may become a party to the Vienna Convention on the Law of Treaties, *to reaffirm its objection* to the foregoing reservation and to reject treaty relations with the Syrian Arab Republic under all provisions in Part V of the

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[1169] See in particular paragraph 3 (b) of draft article 19 proposed by Sir Humphrey Waldock in his first report on the law of treaties (A/CN.4/144, *Yearbook ... 1962*, vol. II, p. 62) or paragraph 6 of the draft article 20 proposed in his fourth report (*Yearbook ... 1965*, vol. II, p. 55).

[1170] Except, perhaps, in a comment made incidentally by Mr. Tunkin, *Yearbook ... 1965*, vol. I, 799th meeting, para. 38: "It was clearly the modern practice that a reservation was valid only if made or confirmed at the moment when final consent to be bound was given, and that was the presumption reflected in the 1962 draft. The same applied to objections to reservations. The point was partially covered in paragraph 6 of the Special Rapporteur's new text for article 20."

[1171] Mimeograph A/CONF.39/6/Add.1, p. 18. The Polish Government proposed that paragraph 2 of article 18 (which became article 23), should be worded as follows: "If formulated on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval, a reservation as well as an eventual objection to it must be formally confirmed by the reserving and objecting States when expressing their consent to be bound by the treaty. In such a case the reservation and the objection shall be considered as having been made on the date of their confirmation."

[1172] The reservations in question are those formulated by the Syrian Arab Republic (point E) and Tunisia (*Multilateral Treaties ...*, chap. XXIII.1).

> Convention with regard to which the Syrian Arab Republic has rejected the obligatory conciliation procedures set forth in the Annex to the Convention".[1173]

Curiously, the second objection by the United States, formulated against the Tunisian reservation, does not contain the same statement.

(3) In its 1951 advisory opinion, the International Court of Justice also seemed to take the view that objections made by States that are not parties do not require confirmation. It considered that:

> "Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification, *or they would become effective on ratification.*
>
> [...] The reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before ratification, have been completed, it would be confronted with a valid objection which carries full legal effect."[1174]

The Court thereby seemed to accept that an objection automatically takes effect as a result of ratification alone, without the need for confirmation.[1175] It has yet to take a formal stand on this question, however, and the debate remains open.

(4) It is possible, however, to deduce from the omission from the text of the Vienna Conventions of any requirement that an objection made by a State or an international organization prior to ratification or approval should be confirmed that neither the members of the Commission nor the delegates at the Vienna Conference[1176] considered that such a confirmation was necessary. The fact that the Polish amendment,[1177] which aimed to bring objections in line with reservations in that regard, was not adopted further confirms this argument. These considerations are further strengthened if one bears in mind that, when the requirement of formal confirmation of reservations formulated when signing the treaty, an obligation now firmly embodied in article 23, paragraph 2, of the Vienna Conventions, was adopted by the Commission, it was more in the nature of progressive development than codification *stricto sensu*.[1178] Thus, the disparity here between the procedural rules established for the formulation of reservations on the one hand and the formulation of objections on the other could not have been due to a simple oversight but should reasonably be considered to have been deliberate.

(5) There are other grounds for the non-requirement of formal confirmation of an objection made by a State or an international organization prior to the expression of its consent to be bound by the treaty. A reservation formulated before the reserving State or international organization becomes a contracting party to the treaty cannot produce any legal effect and remains a "dead letter" until such a time as the State's consent to be bound by the treaty is effectively given. Requiring formal confirmation of the reservation is justified in this case in

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[1173] *Ibid.* (emphasis added).

[1174] *I.C.J. Reports 1951*, footnote 604 above, pp. 28–29 (emphasis added).

[1175] See in this sense F. Horn, footnote 25 above, p. 137.

[1176] *Ibid.*

[1177] See footnote 1171 above.

[1178] See Sir Humphrey Waldock's first report (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 66, paragraph (11) of the commentary to draft article 17; D.W. Greig, footnote 28 above, p. 28; F. Horn, footnote 25 above, p. 41. See also paragraph (8) of commentary to guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty).

particular by the fact that the reservation, once accepted, modifies that consent. The same is not true of objections. Although objections, too, produce the effects provided for in article 20, paragraph 4, and article 21, paragraph 3, of the Vienna Conventions only after the objecting State or international organization has become a contracting party, they are not without significance even before then. They express their author's opinion of a reservation's permissibility and, as such, may be taken into consideration by the bodies having competence to assess the permissibility of reservations.[1179] Moreover, and on this point the 1951 advisory opinion of the International Court of Justice remains valid, objections give reserving States an indication of the attitude of the objecting State *vis-à-vis* their reservation. As the Court observed:

> "The legal interest of a signatory State in objecting to a reservation would thus be amply safeguarded. The reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before ratification, have been completed, it would be confronted with a valid objection which carries full legal effect and consequently, it would have to decide, when the objection is stated, whether it wishes to maintain or withdraw its reservation."[1180]

Such an objection, formulated prior to the expression of consent to be bound by the treaty, thus encourages the reserving State to reconsider, modify or withdraw its reservation in the same way as an objection raised by a contracting State. This notification would, however, become a mere possibility if the objecting State was required to confirm its objection at the time it expressed its consent to be bound by the treaty. The requirement of an additional formal confirmation would thus, in the Commission's view, make it much less important for States and international organizations that are not yet contracting States or contracting organizations to the treaty to be able to make objections.

(6) Moreover, non-confirmation of an objection in such a situation poses no problem of legal security. Objections formulated by a signatory State or by a State entitled to become a party to the treaty must, like any notification or communication relating to the treaty,[1181] be made in writing and communicated and notified, in the same way as objections emanating from a party. Furthermore, unlike a reservation, an objection modifies treaty relations only with respect to the bilateral relations between the reserving State — which has been duly notified — and the objecting State. The rights and obligations assumed by the objecting State *vis-à-vis* other States parties to the treaty are not affected in any way.

(7) As convincing as these considerations might seem, the Commission nevertheless felt it necessary to draw a distinction between two different cases: objections formulated by signatory States or international organizations and objections formulated by States or international organizations that had not yet signed the treaty at the time the objection was formulated. It would seem that by signing the treaty the first category of States and international organizations has legal standing *vis-à-vis* the instrument in question,[1182] while the others have the status of third parties. Even though such third parties can formulate an objection to a reservation,[1183] formal confirmation of such objections at the time the author State or international organization signs the treaty or expresses its consent to be bound by it is all the more necessary in that a significant amount of time can elapse between the time an

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[1179] See paragraph (4) of the commentary to guideline 2.6.9 above.

[1180] *I.C.J. Reports 1951*, footnote 604 above, p. 29.

[1181] See article 78 of the 1969 Vienna Convention and article 79 of the 1986 Vienna Convention.

[1182] See in particular article 18, subparagraph (a), of the Vienna Conventions.

[1183] See guideline 2.6.3 (ii) above.

objection is formulated by a State or international organization that had not signed the treaty when it made the objection and the time at which the objection produces its effects.

(8) The Vienna Conventions do not define the notion of a "State [that] has signed the treaty", which the Commission has used in guideline 2.6.11. It nevertheless follows from article 18, subparagraph (a), of the Vienna Conventions that what is meant is States and international organizations that have "signed the treaty or [have] exchanged instruments constituting the treaty subject to ratification, formal confirmation, acceptance or approval, until [they] shall have made [their] intention clear not to become a party to the treaty".

2.6.12 Time period for formulating objections

Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation within a period of twelve months after it was notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later.

Commentary

(1) The question of the time at which, or until which, a State or an international organization may raise an objection is partially and indirectly addressed in article 20, paragraph 5, of the Vienna Conventions. In its 1986 wording, this provision states:

> "For the purposes of paragraphs 2 and 4,[1184] and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."

(2) Guideline 2.6.12 isolates those elements of the provision having to do specifically with the time period within which an objection can be formulated.[1185] Once again, a distinction is drawn between two possible situations.

(3) The first situation involves States and international organizations that are contracting States or international organizations at the time the reservation is notified. They have a period of twelve months within which to make an objection to a reservation, a period that runs from the time of receipt of the notification of the reservation by the States and international organizations for which it is intended, in accordance with guideline 2.1.6.

(4) The twelve-month period established in article 20, paragraph 5, was the result of an initiative by Sir Humphrey Waldock and was not chosen arbitrarily. By proposing such a time period, he did, however, depart from the State practice of that time, which was quite diverse. The Special Rapporteur had found time periods of 90 days and of six months in treaty

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[1184] Paragraph 2 refers to reservations to treaties with limited participation; paragraph 4 establishes the effects of the acceptance of reservations and objections in all cases other than those of reservations expressly authorized by the treaty, with reference to treaties with limited participation and the constituent acts of international organizations.

[1185] The Commission notes that from a strictly logical standpoint it would have been more appropriate to speak of the time period during which an objection can be "made". It nevertheless chose to remain faithful to the letter of article 20, paragraph 5, of the Vienna Conventions.

practice[1186] but preferred to follow the proposal of the Inter-American Council of Jurists.[1187] He noted in this connection:

> "But there are, it is thought, good reasons for proposing the adoption of the longer period. First, it is one thing to agree upon a short period for the purposes of a particular treaty whose contents are known, and a somewhat different thing to agree upon it as a general rule applicable to every treaty which does not lay down a rule on the point. States may, therefore, find it easier to accept a general time limit for voicing objections, if a longer period is proposed."[1188]

(5) This twelve-month period within which an objection must be formulated in order to reverse the presumption of acceptance, provided for in article 20, paragraph 5, of the Vienna Conventions, did not, however, seem to be a well-established customary rule at the time of the Vienna Conference; nevertheless it is still "the most acceptable" period.[1189] F. Horn has noted in this regard:

> "A too long period could not be admitted, because this would result in a protracted period of uncertainty as to the legal relations between the reserving State and the confronted parties. Nor should the period be too short. That again would not leave enough time for the confronted States to undertake the necessary analysis of the possible effects a reservation may have for them."[1190]

(6) In fact, this time period — which clearly emerged from the progressive development of international law when the Vienna Convention was adopted — has never fully taken hold as a customary rule that is applicable in the absence of text.[1191] For a long time, the practice of the Secretary-General as depositary of multilateral treaties was difficult to reconcile with the provisions of article 20, paragraph 5, of the Vienna Conventions.[1192] This is because in cases where a treaty was silent on the issue of reservations, the Secretary-General traditionally considered that if no objection to a duly notified reservation had been received within 90 days, the reserving State became a contracting State.[1193] However, having decided that this practice delayed the entry into force of treaties and their registration,[1194] the Secretary-General abandoned this practice and now considers any State that has formulated a reservation to be a contracting State as of the date of effect of the instrument of ratification or accession.[1195] In

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[1186] First report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, pp. 66–67, para. 14.

[1187] *Ibid.*, para. 16.

[1188] *Ibid.*

[1189] P.-H. Imbert, footnote 25 above, p. 107. D.W. Greig considers that the twelve-month period established in article 20, paragraph 5, of the Vienna Convention is at least "a guide to what is reasonable" (footnote 25 above), p. 128.

[1190] F. Horn, footnote 25 above, p. 126.

[1191] See D. Müller, *Commentaire de l'article 20* (1969), footnote 1087 above, p. 808, para. 16, and 1969 Vienna Convention Article 20, footnote 1087 above, pp. 495–496, para.16. See also G. Gaja, footnote 28 above, p. 324; D.W. Greig, footnote 28 above, pp. 127 ff.; A. Aust, footnote 155 above, p. 155.

[1192] P.-H. Imbert, footnote 601 above, pp. 524–541; G. Gaja, footnote 28 above, pp. 323–324; R. Riquelme Cortado, footnote 150 above, pp. 245–250; D. Müller, *Commentaire de l'article 20 (1569)*, footnote 1087 above, pp. 821–822, para. 48; 1969 Vienna Convention Article 20, footnote 1087 above, pp. 503–504, para. 43.

[1193] Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (ST/LEG/8), p. 55, para. 185.

[1194] The 90-day period continued to be applied, however, to the acceptance of reservations formulated late for which unanimous acceptance by the contracting States is generally required (*ibid.*, pp. 61–62, paras. 205–206). See guideline 2.3.1 and commentary thereto.

[1195] *Ibid.*, pp. 55–56, paras. 184–187.

order to justify this position, the Secretary-General has pointed out that it is unrealistic to think that the conditions set out in article 20, paragraph 4 (b), could ever be met, since in order to preclude the entry into force of the treaty for the reserving State, all the contracting States and contracting organizations would have had to object to the reservation. The Secretary-General's comments are, therefore, less about the presumption established in paragraph 5 than about the unrealistic nature of the three subparagraphs of paragraph 4. In 2000, the United Nations Legal Counsel also stated that he was in favour of the twelve-month period specified in paragraph 5, which now applies to the necessarily unanimous acceptance of reservations formulated late.[1196] Moreover, State practice shows that States formulate objections even if the twelve-month period specified in article 20, paragraph 5, has elapsed. Whatever uncertainties there may be regarding the "positive quality" of the rule with regard to general international law, the rule is retained in the Vienna Conventions, and modifying it for the purposes of the Guide to Practice would undoubtedly give rise to more drawbacks than advantages: according to the practice adopted by the Commission during its work on reservations, there should be good reason for departing from the wording of the provisions of the Conventions on the law of treaties; surely no such reason exists in the present case.

(7) For the same reason, while the expression "unless the treaty otherwise provides" is self-evident, given that the relevant provisions of the Vienna Conventions are of a residuary, voluntary nature and apply only if the treaty does not otherwise provide, the Commission felt that it would be useful to retain this wording in guideline 2.6.12. A review of the *travaux préparatoires* of article 20, paragraph 5, of the 1969 Vienna Convention in fact explains why this expression was included and thus justifies its retention. Indeed, this phrase ("unless the treaty otherwise provides") was included in response to an amendment proposed by the United States of America.[1197] The United States representative to the Conference explained that an amendment had been proposed because

> "[t]he Commission's text seemed to prevent the negotiating States from providing in the treaty itself for a period shorter or longer than twelve months".[1198]

Thus, the United States amendment was not directed specifically at the twelve-month period established by the Commission, but sought only to make it clear that it was merely a voluntary residual rule that in no way precluded treaty negotiators from establishing a different period.[1199]

(8) The second case covered by guideline 2.6.12 involves States and international organizations that do not acquire "contracting status" until after the twelve-month time period following the date they received notification has elapsed. In this case, States and international organizations may make an objection up until the date on which they express their consent to be bound by the treaty, which, obviously, does not prevent them from doing so before that date.

[1196] Memorandum from the Legal Counsel of the United Nations addressed to the Permanent Representatives of States Members of the United Nations, 4 April 2000. See paragraphs (7) and (8) of the commentary to guideline 2.3.1. The practice of the Council of Europe regarding the acceptance of late reservations, however, is to give contracting States a period of only nine months to formulate an objection (J. Polakiewicz, footnote 638 above, p. 102).

[1197] A/CONF.39/C.1/L.127, in *Documents of the Conference*, footnote 54 above, p. 136.

[1198] *First Session, Summary records*, footnote 35 above, 21st meeting, 10 April 1968, p. 108, para. 13.

[1199] J.M. Ruda argues, however, that the United States amendment emphasizes the "residual character of Article 20, paragraph 5" (J.M. Ruda, footnote 56 above, p. 185).

(9) This solution of drawing a distinction between contracting States and organizations and those that have not yet acquired this status *vis-à-vis* the treaty was contemplated in Mr. Brierly's proposals but was not taken up by either Hersch Lauterpacht or Gerald Fitzmaurice nor retained by the International Law Commission in the articles adopted on first reading in 1962,[1200] even though Sir Humphrey Waldock had included it in the draft article 18 presented in his 1962 report.[1201] In the end, it was reintroduced during the second reading in order to address the criticism voiced by the Australian Government, which was concerned about the practical problems that might arise when the principle of tacit acceptance was actually applied.[1202]

(10) However, this solution in no way places States and international organizations that are not contracting States or contracting organizations at the time the reservation is notified in a position of inequality *vis-à-vis* the contracting States and contracting organizations. On the contrary, one should not lose sight of the fact that, under article 23, paragraph 1, any reservation that has been formulated must be notified not only to the contracting States and contracting organizations but also to other States and international organizations entitled to become parties to the treaty.[1203] States and international organizations "entitled to become parties to the treaty" thus have all the information they need with regard to reservations to a specific treaty and also have a period for reflection that is at least as long[1204] as that given to contracting States or contracting organizations (twelve months).

2.6.13 Objections formulated late

An objection to a reservation formulated after the end of the time period specified in guideline 2.6.12 does not produce all the legal effects of an objection formulated within that time period.

Commentary

(1) There is nothing to prevent States or international organizations from formulating objections late, in other words after the end of the twelve-month period (or any other time period specified by the treaty) or after the expression of consent to be bound in the case of States and international organizations that accede to the treaty after the end of the twelve-month period.[1205]

(2) This practice is far from uncommon. In a study published in 1988, F. Horn found that of 721 objections surveyed, 118 had been formulated late,[1206] and this figure has since

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[1200] Indeed, draft article 19, paragraph 3, presented in the Commission's report to the General Assembly concerned only implied acceptance in the strict sense of the word. See *Yearbook ... 1962*, vol. II, p. 176.

[1201] A/CN.4/144, *Yearbook ... 1962*, vol. II, pp. 61–62.

[1202] Fourth report (A/CN.4/177), *Yearbook ... 1965*, vol. II, p. 45 and p. 53, para. 17.

[1203] See also guideline 2.1.5, paragraph 1.

[1204] Draft article 18, paragraph 3 (b), in Sir Humphrey Waldock's first report formulated the same rule as an exception to observance of the twelve-month period, stipulating that a State that was not a party to the treaty "shall not be deemed to have consented to the reservation if it shall subsequently [i.e. after the twelve-month period has elapsed] lodge an objection to the reservation, when executing the act or acts necessary to qualify it to become a party to the treaty" (*Yearbook ... 1962*, vol. II, p. 61).

[1205] See guideline 2.6.12 and commentary thereto.

[1206] F. Horn, footnote 25 above, p. 261. See also R. Riquelme Cortado, footnote 150 above, pp. 264–265.

increased.[1207] Many examples can be found[1208] relating to human rights treaties[1209] but also to treaties covering subjects as diverse as the law of treaties[1210] or the fight against terrorism,[1211] as well as with respect to the Convention on the Safety of United Nations and Associated Personnel[1212] and the 1998 Rome Statute of the International Criminal Court.[1213]

(3) This practice should certainly not be condemned. On the contrary, it allows States and international organizations to express — in the form of objections — their views as to the validity of a reservation, even when the reservation was formulated more than twelve months earlier, and this practice has its advantages, even if such late objections do not produce any immediate legal effect. As it happens, the position of the States and organizations concerned regarding the validity of a reservation is an important element for the interpreting body, whether a monitoring body or international court, to take into consideration when determining the validity of the reservation. The practice of the Secretary-General as the depositary of multilateral treaties confirms this view. The Secretary-General receives late objections and communicates them to the other States and organizations concerned, in general not as objections but as "communications".[1214] Furthermore, an objection, even a late objection, is important in that it may lead or contribute to a reservations dialogue.[1215]

[1207] R. Riquelme Cortado, *ibid.*, p. 265.

[1208] The examples cited hereafter are solely cases identified by the Secretary-General and, consequently, notified as "communications". The study is complicated by the fact that, in the collection of multilateral treaties deposited with the Secretary-General, the date indicated is not that of notification but of deposit of the instrument containing the reservation.

[1209] See the comprehensive list drawn up by R. Riquelme Cortado, footnote 150 above, p. 265 (footnote 316). See also the late objections made by Sweden (18 October 2010) and the United Kingdom (21 October 2010) to the reservation made by the Lao People's Democratic Republic to the International Covenant on Civil and Political Rights (25 September 2009) (*ibid.*, chap. IV.4).

[1210] *Ibid.*, p. 265 (footnote 317).

[1211] See the objections formulated late to the declaration made by Pakistan (13 August 2002) upon accession to the 1997 International Convention for the Suppression of Terrorist Bombings: Republic of Moldova (6 October 2003), Russian Federation (22 September 2003) and Poland (3 February 2004) (*Multilateral Treaties ...*, chap. XVIII.9); or the objections formulated late to the reservations formulated by the following States in regard to the 1999 International Convention for the Suppression of the Financing of Terrorism: reservation by Belgium (17 May 2004): Russian Federation (7 June 2005) and Argentina (22 August 2005); declaration by Jordan (28 August 2003): Belgium (24 September 2004), Russian Federation (1 March 2005), Japan (14 July 2005), Argentina (22 August 2005); Ireland (23 June 2006), Czech Republic (23 August 2006); reservation by the Syrian Arab Republic (24 April 2005): Ireland (23 June 2006), Czech Republic (23 August 2006); reservation by the Democratic People's Republic of Korea (12 November 2001, at the time of signature; as the State has not ratified the Convention, the reservation has not been confirmed): Republic of Moldova (6 October 2003), Germany (17 June 2004), Argentina (22 August 2005) (*ibid.*, chap. XVIII.11); Yemen (3 March 2010): Belgium (25 March 2011).

[1212] See the objections formulated late by Portugal (15 December 2005) concerning the declaration by Turkey (9 August 2004) (*ibid.*, chap. XVIII.8).

[1213] See the objections formulated late by Ireland (28 July 2003), the United Kingdom (31 July 2003), Denmark (21 August 2003) and Norway (29 August 2003) to the interpretative declaration (considered by objecting States to constitute a prohibited reservation) by Uruguay (28 June 2002) (*ibid.*, chap. XVIII.10).

[1214] *Summary of Practice ...*, footnote 75 above, 1997, para. 213): "taking into account the indicative value of this provision in the Vienna Convention [article 20, paragraph 5], the Secretary-General, when thus receiving an objection after the expiry of this time lapse, calls it a 'communication' when informing the parties concerned of the deposit of the objection". In *Multilateral Treaties Deposited with the Secretary-General*, however, several examples of late

(4) However, it follows from article 20, paragraph 5, of the Vienna Conventions that if a State or international organization has not raised an objection by the end of the twelve-month time period following the formulation of the reservation or by the date on which it expresses its consent to be bound by the treaty, it is considered to have accepted the reservation, with all the consequences that that entails. Without going into the details of the effects of this type of tacit acceptance, suffice it to say that the effect of such an acceptance is, in principle, that the treaty enters into force between the reserving State or international organization and the State or organization considered as having accepted the reservation. This result cannot be called into question by an objection formulated after the treaty has entered into force between the two States or international organizations without seriously affecting legal security.

(5) States seem to be aware that a late objection cannot produce all the effects of an objection made in good time. The Government of the United Kingdom, in its objection (made within the required twelve-month period) to the reservation of Rwanda to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, said that it wished "to place on record that they take the same view [in other words, that the Government was unable to accept the reservation] of the similar [to that of Rwanda] reservation made by the German Democratic Republic as notified by the circular letter [...] of 25 April 1973".[1216] It is clear that the British objection to the reservation of the German Democratic Republic was late. The careful wording of the objection shows that the United Kingdom did not expect its objection to produce the legal effects of one formulated within the period specified by article 20, paragraph 5, of the 1969 Vienna Convention.

(6) The communication of 21 January 2002 from the Peruvian Government regarding a late — by only a few days — objection by Austria[1217] concerning its reservation to the 1969 Vienna Convention on the Law of Treaties is particularly interesting:

> "[The Government of Peru refers to the communication made by the Government of Austria relating to the reservation made by Peru upon ratification]. In this document, Member States are informed of a communication from the Government of Austria stating its objection to the reservation entered in respect of the Vienna Convention on the Law of Treaties by the Government of Peru on 14 September 2000 when depositing the corresponding instrument of ratification.

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objections are given in the section "Objections". This is the case, for example, with the objection raised by Japan (27 January 1987) to the reservations formulated by Bahrain (2 November 1971) and Qatar (6 June 1986) to the 1961 Vienna Convention on Diplomatic Relations. While the objection was very late insofar as the reservation made by Bahrain was concerned, it was received in good time concerning the reservation made by Qatar; it was no doubt for that reason that the objection was communicated as such, and not simply as a "communication" (*Multilateral Treaties* ..., chap. III.3).

[1215] Following the late objection by Sweden, Thailand withdrew its reservation in respect of the Convention on "[l]'obiezione è strumento utilizzato non solo e non tanto per manifestare la propria disapprovazione all'atto-riserva altrui e per rilevarne, talvolta, l'incompatibilità con ulteriori obblighi posti dell'ordinamento internazionale, quanto e piuttosto per indurre l'autore della riserva a riconsiderarla e possibilmente a ritirarla" the Rights of the Child (*ibid.*, chap. IV.11). Baratta considered that ("objections are a tool used not only and not chiefly to express disapproval of the reservation of another and sometimes to point out its incompatibility with further obligations under international law but also and mainly to induce the author of the reservation to reconsider and possibly to withdraw it") (R. Baratta, footnote 701 above, pp. 319–320).

[1216] *Multilateral Treaties* ..., chap. IV.1.

[1217] This late objection was notified as a "communication" (*ibid.*, chap. XXIII.1).

> As the [Secretariat] is aware, article 20, paragraph 5, of the Vienna Convention states that 'a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation (...).' The ratification and reservation by Peru in respect of the Vienna Convention were communicated to Member States on 9 November 2000.
>
> Since the communication from the Austrian Government was received by the Secretariat on 14 November 2001 and circulated to Member States on 28 November 2001, the Peruvian Mission is of the view that there is tacit acceptance on the part of the Austrian Government of the reservation entered by Peru, the twelve-month period referred to in article 20, paragraph 5, of the Vienna Convention having elapsed without any objection being raised. The Peruvian Government considers the communication from the Austrian Government as being without legal effect, since it was not submitted in a timely manner."[1218]

Although it would appear excessive to consider the Austrian communication as being completely devoid of legal effect, the Peruvian communication shows very clearly that a late objection cannot preclude the operation of the presumption of acceptance under article 20, paragraph 5, of the Vienna Conventions.

(7) It follows from the foregoing that while an objection formulated late may constitute an element in determining the validity of a reservation, it cannot produce the "normal" effects of an objection of the type provided for in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions.[1219] Although these late objections are incapable of producing the effects of an objection, such declarations correspond to the definition of objections contained in guideline 2.6.1 as it relates to guideline 2.6.12. As the commentary to guideline 2.6.3 notes,[1220] an objection (like a reservation) is defined not by the effects it produces but by those that its author wishes it to produce.

(8) The wording of guideline 2.6.13 is sufficiently flexible to accommodate established State practice where reservations formulated late are concerned. While it does not prohibit States or international organizations from formulating objections after the time period required by guideline 2.6.12 has elapsed, it spells out explicitly that they do not produce the legal effects of an objection made within that time period.

2.7 Withdrawal and modification of objections to reservations

Commentary

(1) The question of the withdrawal of objections to reservations, like that of the withdrawal of reservations, is addressed only very cursorily in the Vienna Conventions.[1221] There are merely some indications as to how objections may be withdrawn and when such withdrawals become operative. The modification of objections is not addressed at all.

(2) Article 22, paragraphs 2 and 3, of the 1986 Vienna Convention provides as follows:

[1218] *Ibid.*

[1219] This does not prejudge the question of whether, and how, a reservation that is presumed to be accepted produces the "normal" effect provided for under article 21, paragraph 1, of the Vienna Conventions.

[1220] See paragraph (4) of the commentary.

[1221] Especially concerning the effects of the withdrawal of reservations. See R. Szafarz, footnote 27 above, p. 314.

> "2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.
>
> 3. Unless the treaty otherwise provides, or it is otherwise agreed:
>
> (a) [...]
>
> (b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation."

Article 23, paragraph 4, stipulates how objections may be withdrawn:

> "The withdrawal of a reservation or of an objection to a reservation must be formulated in writing."

(3) The *travaux préparatoires* of the Vienna Conventions relating to the withdrawal of objections are hardly more enlightening. The question is not dealt with at all in the work of the early special rapporteurs, which is hardly surprising, given their advocacy of the traditional theory of unanimity, which logically precluded the possibility of an objection being withdrawn. Just as logically, it was the first report by Sir Humphrey Waldock, who favoured the flexible system, which contained the first proposal for a provision concerning the withdrawal of objections to reservations. He proposed the following text for draft article 19, paragraph 5:

> "A State which has lodged an objection to a reservation shall be free to withdraw it unilaterally, either in whole or in part, at any time. Withdrawal of the objection shall be effected by written notification to the depositary of the instruments relating to the treaty, and failing any such depositary, to every State which is or is entitled to become a party to the treaty."[1222]

After a major reworking of the provisions on the form and procedure relating to reservations and objections, this draft article — which simply reiterated *mutatis mutandis* the similar provision on the withdrawal of a reservation[1223] — was abandoned; the reasons for this are not clear from the Commission's work. No such provision is to be found in either the text adopted on first reading or in the Commission's final draft.

(4) It was only during the Vienna Conference that the issue of the withdrawal of objections was reintroduced into the text of articles 22 and 23, following a Hungarian amendment[1224] which realigned the procedure for the withdrawal of objections with that for the withdrawal of reservations. As Ms. Bokor-Szegó explained on behalf of the Hungarian delegation:

[1222] *Yearbook ... 1962*, vol. II, p. 62.

[1223] Draft article 17, paragraph 6, provided as follows: "A State which has formulated a reservation is free to withdraw it unilaterally, either in whole or in part, at any time, whether the reservation has been accepted or rejected by the other States concerned. Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty" (*ibid.*, p. 61). The similarity between the two texts was highlighted by Waldock, who considered in the commentary on draft article 19, paragraph 5, that the latter provision reflected paragraph 6 of draft article 17 and "[did] not therefore need further explanation" (*ibid.*, p. 68, para. (22) of the commentary).

[1224] A/CONF.39/L.18, in *Documents of the Conference*, footnote 54 above, p. 267. The Hungarian amendment was adopted, with a slight modification, by 98 votes to none (*Second Session, Summary records*, A/CONF.39/11/Add.1, footnote 332 above, 11th plenary meeting, 30 April 1969, para. 41).

> "If a provision on the withdrawal of reservations was included, it was essential that there should also be a reference to the possibility of withdrawing objections to reservations, particularly since that possibility already existed in practice."[1225]

The representative of Italy at the Conference also argued in favour of aligning the procedure for the withdrawal of an objection to a reservation with that for the withdrawal of a reservation:

> "The relation between a reservation and an objection to a reservation was the same as that between a claim and a counter-claim. The extinction of a claim, or the withdrawal of a reservation, was counter-balanced by the extinction of a counter-claim or the withdrawal of an objection to a reservation, which was equally a diplomatic and legal procedural stage in treaty-making."[1226]

(5) However, there is virtually no State practice in this area. Frank Horn could only identify one example of a clear, definite withdrawal of an objection:[1227] in 1982 the Cuban Government notified the Secretary-General of the withdrawal of objections it had made when ratifying the Convention on the Prevention and Punishment of the Crime of Genocide with respect to the reservations to articles IX and XII formulated by several socialist States.[1228]

(6) Although the provisions of the Vienna Convention do not go into detail on the issue of withdrawal of objections, it is clear from the *travaux préparatoires* that, in principle, the withdrawal of objections ought to follow the same rules as the withdrawal of reservations, just as the formulation of objections follows the same rules as the formulation of reservations.[1229] To make the relevant provisions clear and specific, the Commission based itself on the guidelines on the withdrawal (and modification) of reservations,[1230] making the necessary changes to take account of the specific nature of objections. However, this should not be seen in any way as an attempt to implement the theory of parallelism of forms;[1231] it is not a matter of aligning the procedure for the withdrawal of objections with the procedure for their formulation, but of applying the same rules to the withdrawal of an objection as those applicable to the withdrawal of a reservation. The two acts doubtless have different effects on treaty relations and differ in their nature and their intended recipients. Nevertheless, they are similar enough to be governed by comparable formal systems and procedures, as was suggested during the *travaux préparatoires* of the 1969 Vienna Convention.

(7) Like those relating to the withdrawal and modification of reservations, the guidelines contained in this section concern, respectively: the form and procedure for withdrawal; the effects of withdrawal; the time at which withdrawal of an objection produces those effects; partial withdrawal; and the possible widening of the scope of an objection.

2.7.1 Withdrawal of objections to reservations

Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

[1225] *Ibid.*, para. 14.

[1226] *Ibid.*, para. 27.

[1227] F. Horn, footnote 25 above, p. 227.

[1228] *Multilateral Treaties ...*, chap. IV.1.

[1229] See paragraphs (1) to (6) of the commentary to guideline 2.6.8.

[1230] Cf. guidelines 2.5.1 to 2.5.9.

[1231] See paragraph (6) of the commentary to guideline 2.5.4.

Commentary

(1) The question of the possibility of withdrawing an objection and the time at which it is withdrawn is answered in the Vienna Conventions, in particular in article 22, paragraph 2.[1232] Neither the possibility of withdrawing an objection at any time nor the time at which it may be withdrawn require further elaboration, and the provisions of article 22, paragraph 2, of the Vienna Conventions are in themselves sufficient. Moreover, there is virtually no State practice in this area. Guideline 2.7.1 thus simply reproduces the text of the Vienna Conventions.

(2) While in principle it would be prudent to align the provisions relating to the withdrawal of objections with those relating to the withdrawal of reservations,[1233] it must be noted that there is a significant difference in the wording of paragraph 1 (relating to the withdrawal of reservations) and that of paragraph 2 (relating to the withdrawal of objections) of article 22: whereas paragraph 1 is careful to state, with regard to a reservation, that "the consent of a State which has accepted the reservation is not required for its withdrawal",[1234] paragraph 2 does not make the same specification as far as objections are concerned. This difference in wording is logical: in the latter case, the purely unilateral character of the withdrawal is self-evident. This is in fact why the part of the Hungarian amendment[1235] that would have brought the wording of paragraph 2 into line with that of paragraph 1 was set aside at the request of the British delegation,

> "in view of the differing nature of reservations and objections to reservations; the consent of the reserving State was self-evidently not required for the withdrawal of the objection, and an express provision to that effect might suggest that there was some doubt on the point".[1236]

This is a convincing rationale for the different wording of the two provisions, which does not need to be revisited.

2.7.2 Form of withdrawal of objections to reservations

The withdrawal of an objection to a reservation must be formulated in writing.

Commentary

(1) The answer to the question of the form the withdrawal of an objection should take is likewise to be found in article 23, paragraph 4, of the Vienna Conventions.[1237] The requirement that it should be in writing does not call for any lengthy explanations, and the rules of the Vienna Conventions are adequate in themselves: although it is doubtful that the theory of parallelism of forms would be accepted in international law,[1238] it is certainly reasonable to require a certain degree of formality for the withdrawal of objections, which, like reservations themselves, must be formulated in writing.[1239] A verbal withdrawal would

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[1232] See paragraph (2) of the introductory commentary to section 2.7.

[1233] See *ibid.*, *passim*.

[1234] On this point, see guideline 2.5.1 and commentary thereto.

[1235] A/CONF.39/L.18, in *Documents of the Conference*, footnote 54 above, p. 267. This amendment resulted in the inclusion of paragraph 2 in article 22 (see paragraph (4) of the introductory commentary to section 2.7 above).

[1236] *Second Session, Summary records*, footnote 332 above, 11th plenary meeting, 30 April 1969, p. 38, para. 31.

[1237] See paragraph (2) of the introductory commentary to section 2.7.

[1238] See paragraph (6) of the commentary to guideline 2.5.4.

[1239] See paragraph (3) of the commentary to guideline 2.5.2.

entail considerable uncertainty, which would not necessarily be limited to the bilateral relations between the reserving State or organization and the author of the initial objection.[1240]

(2) Guideline 2.7.2 now reproduces the text of article 23, paragraph 4, of both the 1969 and 1986 Vienna Conventions, which have identical wording.

(3) The form of a withdrawal of an objection to a reservation is thus identical to the form of a withdrawal to a reservation.

2.7.3 Formulation and communication of the withdrawal of objections to reservations

Guidelines 2.5.4, 2.5.5 and 2.5.6 are applicable *mutatis mutandis* to the withdrawal of objections to reservations.

Commentary

(1) Neither the 1969 nor the 1986 Vienna Conventions contains any specific provisions relating to the formulation and communication of a withdrawal. However, it is abundantly clear from the *travaux préparatoires* of the 1969 Convention[1241] that, as in the case of the formulation of objections and the formulation of reservations,[1242] the procedure to be followed in withdrawing unilateral declarations must be identical to that followed when withdrawing a reservation.

(2) Accordingly, the Commission simply took note of this procedural parallelism between the withdrawal of a reservation and the withdrawal of an objection, which holds for the authority competent to make the withdrawal at the international level and the consequences (or rather the absence of consequences) of the violation of the rules of internal law at the time of formulation and those of notification and communication of the withdrawal. It would appear that they can be transposed *mutatis mutandis* to the withdrawal of objections. Rather than reproduce, by merely replacing the word "reservation" with the word "objection" in the text, guidelines 2.5.4 (Representation for the purpose of withdrawing a reservation at the international level), 2.5.5 (Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations) and 2.5.6 (Communication of withdrawal of a reservation), with the last of these itself referring back to the guidelines concerning the communication of reservations and the role of the depositary, the Commission considered it preferable to refer to all of these guidelines,[1243] which apply *mutatis mutandis* to objections.

2.7.4 Effect on reservation of withdrawal of an objection

A State or an international organization that withdraws an objection formulated to a reservation is presumed to have accepted that reservation.

[1240] Given that the withdrawal of an objection resembles an acceptance of a reservation, it might, in certain circumstances, lead to the entry into force of the treaty *vis-à-vis* the reserving State or organization.

[1241] See paragraphs (3) to (6) of the introductory commentary to section 2.7 above.

[1242] See guideline 2.6.8 and commentary thereto, above.

[1243] The Commission proceeded in a similar manner with guidelines 1.6.2 (which refers back to guidelines 1.2 and 1.4), 2.4.5 (which refers back to guidelines 2.1.5, 2.1.6 and 2.1.7), 2.5.6 (which refers back to guidelines 2.1.5, 2.1.6 and 2.1.7) and 2.6.8 (which refers back to guidelines 2.1.3 to 2.1.7).

Commentary

(1) As it did with the withdrawal of reservations,[1244] the Commission considered the effects of the withdrawal of an objection in the part devoted to the procedure for withdrawal. However, the question proved to be infinitely more complex: whereas withdrawing a reservation simply restores the integrity of the treaty in its relations as between the author of the reservation and the other parties, the effects of withdrawing an objection are likely to be manifold.

(2) A State or an international organization that withdraws its objection to a reservation must be presumed to have accepted the reservation. This follows implicitly from the presumption of article 20, paragraph 5, of the Vienna Conventions, which considers the lack of an objection by a State or an international organization to be an acceptance. Professor Bowett has even asserted that "the withdrawal of an objection to a reservation ... becomes equivalent to acceptance of the reservation".[1245]

(3) Yet it is not evident that with the withdrawal of an objection "the reservation has full effect".[1246] As it happens, the effects of the withdrawal of an objection or of the resulting "delayed" acceptance can be manifold and complex, depending on factors relating not only to the nature and validity of the reservation, but also — and above all — to the characteristics of the objection itself:[1247]

- If the objection was not accompanied by the definitive declaration provided for in article 20, paragraph 4 (b), of the Convention, the reservation produces its "normal" effects as provided for in article 21, paragraph 1;
- If the objection was a "maximum-effect" objection, the treaty enters into force between the two parties and the reservation produces its full effects in accordance with the provisions of article 21;
- If the objection was a clause precluding the treaty from entering into force between all parties pursuant to article 20, paragraph 2, or with regard to the reserving State in application of article 20, paragraph 4, the treaty enters into force (and the reservation produces its effects).

This last situation in particular shows that the effects of the withdrawal of an objection not only relate to the establishment of the reservation, but may also have an impact on the entry into force of the treaty itself.[1248] The Commission nevertheless considered it preferable to restrict guideline 2.7.4 to the effects of an objection "on the reservation" and adopted the title of this guideline for that reason.

(4) Not only does it seem difficult to adopt a provision covering all the effects of the withdrawal of an objection, owing to the complexity of the question, but doing so might also prejudge the question of the effects of a reservation and the acceptance of a reservation. The Commission therefore considered that, owing to the complexity of the effects of the withdrawal of an objection, it would be better to regard the withdrawal of an objection to a reservation as being equivalent to an acceptance and to consider that a State that has

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[1244] See guideline 2.5.7 (Effect of withdrawal of a reservation) and commentary thereto.

[1245] D. Bowett, footnote 150 above, p. 88. See also R. Szafarz, footnote 27 above, p. 314, and L. Migliorino, footnote 813 above, p. 329.

[1246] D. Bowett, *ibid.*, p. 88.

[1247] In this connection see R. Szafarz, footnote 27 above, p. 314, and L. Migliorino, footnote 813 above, p. 329.

[1248] See paragraph (3) of the commentary to guideline 2.7.5 below.

withdrawn its objection must be considered to have accepted the reservation, without examining, at the present stage, the nature and substance of the effects of such an acceptance, which are the subject of Part 4 of the Guide to Practice. Such a provision implicitly refers to acceptances and their effects, which are the subject of guidelines 4.2.1 to 4.2.4. The question of when these effects occur is the subject of guideline 2.7.5.

2.7.5 Effective date of withdrawal of an objection

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

Commentary

(1) The Vienna Conventions contain a very clear provision concerning the time at which the withdrawal of an objection becomes operative. Article 22, paragraph 3 (b), of the 1986 Convention states:

> "3. Unless the treaty otherwise provides, or it is otherwise agreed:
>
> (a) ...
>
> (b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation."

(2) This provision differs from the corresponding rule on the effective date of withdrawal of a reservation in that, in the latter case, the withdrawal becomes operative "in relation to another contracting State or a contracting organization only when notice of it has been received by that State or that organization". The reasons for this difference in wording can easily be understood. Whereas withdrawing a reservation hypothetically modifies the content of treaty obligations between the reserving State or international organization and all the other contracting States or organizations, withdrawing an objection to a reservation modifies in principle only the bilateral treaty relationship between the reserving State or organization and the author of the objection. Ms. Bokor Szegó, the representative of Hungary at the 1969 Vienna Conference, explained the difference in the wording between subparagraph (a) and subparagraph (b) as proposed by her delegation as follows:[1249]

> "Withdrawal of an objection directly concerned only the objecting State and the reserving State."[1250]

(3) However, the effects of withdrawing an objection to a reservation may go beyond this strictly bilateral relationship between the reserving party and the objecting party. Everything depends on the content and scale of the objection: its withdrawal may even result in the treaty entering into force between all the States and international organizations that ratified it. This occurs in particular when an objection has prevented the entry into force between the parties of a treaty with limited participation (art. 20, para. 2, of the Vienna Conventions) or, a less likely scenario, when the withdrawal of an objection makes the reserving State or international organization a party to the treaty in question, thereby bringing the number of parties up to the number required for the treaty's entry into force. In this case, one may well ask whether it is

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[1249] See paragraph (4) of the introductory commentary to section 2.7 above.

[1250] *Second Session, Summary records*, footnote 332 above, 11th plenary meeting, 30 April 1969, pp. 36–37, para. 14.

legitimate that the effective date of withdrawal of an objection to a reservation should depend solely on the notification of that withdrawal to the reserving State, which is certainly the chief, but not necessarily the only, interested party. In the above-mentioned situations, limiting the requirement to give notice in this way means that the other contracting States or organizations are not in a position to determine the exact date on which the treaty enters into force.

(4) This drawback appears to be more theoretical than real, however, since the withdrawal of an objection must be communicated not only to the reserving State but also to all the States and organizations concerned or to the depositary of the treaty, who will transmit the communication.[1251]

(5) The other disadvantages of the rule setting the effective date at notification of the withdrawal were presented in the context of the withdrawal of reservations in the commentary to guideline 2.5.8 (Effective date of withdrawal of a reservation).[1252] They concern the immediacy of that effect on the one hand, and, on the other, the uncertainty facing the author of the withdrawal as to the date notification is received by the State or international organization concerned. The same considerations apply to the withdrawal of an objection, but there they pose far fewer problems. As far as the immediacy of the effect of the withdrawal is concerned, it will be recalled that the chief interested party is the author of the reservation, who would like the reservation to produce all its effects on another contracting party: the quicker the objection is withdrawn, the better it is from the author's perspective. It is the author of the objection, meanwhile, who determines this notification and who must make the necessary preparations (including the preparation of domestic law) to ensure that the withdrawal produces all its effects (and, in particular, that the reservation is applicable in the relations between the two States).

(6) In the light of these considerations and in keeping with the Commission's practice, it does not seem necessary to modify the rule set forth in article 22, paragraph 3 (b), of the Vienna Conventions. Taking into account the recent practice of the principal depositaries of multilateral treaties and, in particular, that of the Secretary-General of the United Nations,[1253] who use modern, rapid means of communication to transmit notifications, States and international organizations other than the reserving State or organization should normally receive the notification at the same time as the directly interested party. Simply reproducing this provision of the Vienna Convention would thus seem justified.

(7) In accordance with the practice followed by the Commission, guideline 2.7.5 is thus identical to article 22, paragraph 3 (b), of the 1986 Vienna Convention, which is more comprehensive than the corresponding 1969 provision in that it takes international organizations into account without altering the meaning in any way. It is for this very reason that the Commission decided not to replace the phrase "becomes operative" in the English text

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[1251] This follows from guideline 2.7.3 (Formulation and communication of the withdrawal of objections to reservations) and of guidelines 2.5.6 (Communication of withdrawal of a reservation) and 2.1.6 (Procedure for communication of reservations), to which it refers. Consequently, the withdrawal of the objection must be communicated "to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty".

[1252] See the commentary to guideline 2.5.8 (Effective date of withdrawal of a reservation).

[1253] See paragraphs (14) to (18) of the commentary to guideline 2.1.6 (Procedure for communication of reservations). See also P. Kohona, "Some Notable Developments ...", footnote 582 above, pp. 433–450, and "Reservations: Discussion of Recent Developments ...", footnote 582 above, pp. 415–450.

with the phrase "takes effect", which would seem to mean the same thing.[1254] This linguistic problem arises only in the English version of the text.

2.7.6 Cases in which the author of an objection may set the effective date of withdrawal of the objection

The withdrawal of an objection becomes operative on the date set by its author where that date is later than the date on which the reserving State or international organization received notice of it.

Commentary

(1) For the reasons given in the commentary to guideline 2.5.9 (Cases in which the author of a reservation may set the effective date of withdrawal of the reservation), the Commission felt it necessary to adopt a guideline that was analogous in order to cover the situation in which the objecting State or international organization unilaterally sets the effective date of withdrawal of its objection, without, however, entirely reproducing the former guideline.

(2) In fact, in the case where the author of the objection decides to set as the effective date of withdrawal of its objection a date earlier than that on which the reserving State received notification of the withdrawal, a situation corresponding *mutatis mutandis* to subparagraph (b) of guideline 2.5.9,[1255] the reserving State or international organization is placed in a particularly awkward position. The State or international organization that has withdrawn its objection is considered as having accepted the reservation and may therefore, in accordance with the provisions of article 21, paragraph 1, invoke the effect of the reservation on a reciprocal basis; the reserving State or international organization would then have incurred international obligations without being aware of it, and this could seriously undermine legal security in treaty relations. It is for this reason that the Commission decided quite simply to rule out this possibility and to omit it from guideline 2.7.6. As a result, only a date later than the date of notification of the reservation may be set by an objecting State or international organization when withdrawing an objection.

(3) In the English version of guideline 2.7.6, the phrase "becomes operative" calls for the same comments as in the case of guideline 2.7.5.[1256]

2.7.7 Partial withdrawal of an objection

1. Unless the treaty otherwise provides, a State or an international organization may partially withdraw an objection to a reservation.

2. The partial withdrawal of an objection is subject to the same rules on form and procedure as a total withdrawal and becomes operative on the same conditions.

[1254] See also paragraph (3) of the commentary to guideline 2.7.6 and paragraph (5) of the commentary to guideline 2.7.7.

[1255] Paragraphs (4) and (5) of the commentary to guideline 2.5.9.

[1256] See paragraph (7) of the commentary to guideline 2.7.5. See also paragraph (5) of the commentary to guideline 2.7.7.

Commentary

(1) As with the withdrawal of reservations, it is quite conceivable that a State (or international organization) might modify an objection to a reservation by partially withdrawing it. If a State or an international organization can withdraw its objection to a reservation at any time, it is hard to see why it could not simply narrow its scope. Two quite different situations illustrate this point:

- In the first place, a State might change an objection with "maximum"[1257] or "intermediate"[1258] effect into a "normal" or "simple" objection;[1259] in such cases, the modified objection will produce the effects foreseen in article 21, paragraph 3. Moving from an objection with maximum effect to a simple objection or one with intermediate effect also brings about the entry into force of the treaty as between the author of the reservation and the author of the objection;[1260]
- In the second place, it would appear that there is nothing to prevent a State from "limiting" the actual content of its objection (by accepting certain aspects of reservations that lend themselves to being separated out in such a way)[1261] while maintaining its principle; in this case, the relations between the two States are governed by the new formulation of the objection.

(2) The Commission has no knowledge of a case in State practice involving such a partial withdrawal of an objection. This does not, however, appear to be sufficient ground for ruling out such a hypothesis. In his first report, Sir Humphrey Waldock expressly provided for the possibility of a partial withdrawal of this kind. Paragraph 5 of draft article 19, which was devoted entirely to objections but subsequently disappeared in the light of changes made to the structure of the draft articles, states:

> "A State which has lodged an objection to a reservation shall be free to withdraw it unilaterally, either in whole or *in part*, at any time."[1262]

[1257] An objection with "maximum" effect is an objection in which its author expresses the intention of preventing the treaty from entering into force as between itself and the author of the reservation in accordance with the provisions of article 20, paragraph 4 (b), of the Vienna Conventions. See paragraph (22) of the commentary to guideline 2.6.1.

[1258] By making an objection with "intermediate" effect, a State expresses its intention to enter into treaty relations with the author of the reservation but considers that the exclusion of treaty relations should go beyond what is provided for in article 21, paragraph 3, of the Vienna Conventions. See paragraph (23) of the commentary to guideline 2.6.1.

[1259] "Normal" or "simple" objections are those with "minimum" effect, as provided for in article 21, paragraph 3, of the Vienna Conventions. See paragraph (22) of the commentary to guideline 2.6.1.

[1260] If, on the contrary, an objection with "super-maximum" effect was abandoned and replaced by an objection with maximum effect, the treaty would no longer be in force between the States or international organizations concerned; even if an objection with super-maximum effect is held to be valid, this would enlarge the scope of the objection, which is not possible (see guideline 2.7.9 and commentary thereto). An objection with "super-maximum" effect states not only that the reservation to which the objection is made is not valid, but also that, as a result, the treaty applies *ipso facto* as a whole in the relations between the two States. See paragraph (24) of the commentary to guideline 2.6.1.

[1261] In some cases, the question of whether, in the latter hypothesis, it is really possible to speak of a "limitation" of this kind is debatable – although no more nor no less than the question of whether modifying a reservation is tantamount to its partial withdrawal.

[1262] *Yearbook ... 1962*, vol. II, p. 62 (emphasis added).

The commentary to this provision[1263] presented by the Special Rapporteur offers no explanation of the reasons why he proposed it. Nonetheless, it is noteworthy that this draft article 19, paragraph 5, was again identical to the corresponding proposal concerning the withdrawal of reservations,[1264] as Sir Humphrey made explicit in his commentary.[1265]

(3) The arguments which led the Commission to allow for the possibility of partial withdrawal of reservations[1266] may be transposed *mutatis mutandis* to the partial withdrawal of objections, even though what is intended in this case is not a more thorough application of the treaty but, on the contrary, to give full effect (or greater effect) to a reservation. Consequently, just as partial withdrawal of a reservation follows the rules applicable to full withdrawal,[1267] it would seem that the procedure for the partial withdrawal of an objection should be modelled on that of its total withdrawal. Guideline 2.7.7 has been formulated to reflect this.

(4) Given the problems inherent in determining the effects of total withdrawal of an objection in the abstract,[1268] the Commission felt that it was neither possible nor necessary to define the term "partial withdrawal" any further. It was enough to say that partial withdrawal is necessarily something less than full withdrawal and that it limits the legal effects of the objection *vis-à-vis* the reservation without wiping them out entirely: as the above examples show, the reservation is not simply accepted; rather, the objecting State or international organization merely seek to alter slightly the effects of an objection which, in the main, is maintained.

(5) In the English version of guideline 2.7.7, the phrase "becomes operative" calls for the same comments as those expressed with reference to guideline 2.7.5.[1269]

2.7.8 Effect of a partial withdrawal of an objection

The partial withdrawal modifies the legal effects of the objection on the treaty relations between the author of the objection and the author of the reservation to the extent provided by the new formulation of the objection.

Commentary

(1) It is difficult to determine *in abstracto* what effects are produced by the withdrawal of an objection and even more difficult to say with certainty what concrete effect a partial withdrawal of an objection is likely to produce. In order to cover all possible effects, the Commission wanted to adopt a guideline that was sufficiently broad and flexible. It considered that the wording of guideline 2.5.11 concerning the effects of a partial withdrawal of a reservation met this requirement. Consequently, guideline 2.7.8 is modelled on that guideline.

[1263] *Ibid.*, p. 68.

[1264] See draft article 17, paragraph 6, *ibid.*, p. 61.

[1265] *Ibid.*, p. 68.

[1266] See paragraphs (11) and (12) of the commentary to guideline 2.5.10 (Partial withdrawal of a reservation).

[1267] See paragraph 2 of guideline 2.5.10 (Partial withdrawal of a reservation): "The partial withdrawal of a reservation is subject to the same rules on form and procedure as a total withdrawal and becomes operative on the same conditions."

[1268] See the commentary to guideline 2.7.4 above.

[1269] See paragraph (7) of the commentary to guideline 2.7.5. See also paragraph (3) of the commentary to guideline 2.7.6.

(2) While the text of guideline 2.7.8 does not explicitly say so, it is clear that the term "partial withdrawal" implies that by partially withdrawing its objection, the State or international organization that is the author of the objection intends to limit the legal effects of the objection, it being understood that this may prove fruitless if the legal effects of the reservation are already jeopardized as a result of problems relating to the validity of the reservation.

(3) The objection itself produces its effects independently of any reaction on the part of the author of the reservation. If States and international organizations can make objections as they see fit, they may similarly withdraw them or limit their legal effects at will.

2.7.9 Widening of the scope of an objection to a reservation

1. A State or an international organization which has made an objection to a reservation may widen the scope of that objection during the time period referred to in guideline 2.6.12.

2. Such a widening of the scope of the objection cannot have an effect on the existence of treaty relations between the author of the reservation and the author of the objection.

Commentary

(1) Neither the *travaux préparatoires* of the 1969 and 1986 Vienna Conventions nor the text of the Conventions themselves contain any provisions or indications concerning the question of the widening of the scope of an objection made previously by a State or international organization, and there is no State practice in this area.

(2) In theory it is entirely conceivable that a State or international organization that has already raised an objection to a reservation may wish to widen the scope of its objection, for example by adding the declaration provided for in article 20, paragraph 4 (b), of the Vienna Conventions, thereby transforming it from a simple objection which does not preclude the entry into force of the treaty as between the objecting and reserving parties, into an objection with "maximum effect", which precludes any treaty-based relations between the objecting and reserving parties.

(3) Since in principle the reserving party does not have the right to respond to an objection, there is a risk that allowing such a widening of the scope of an objection might amount to making the reserving State dependent on the goodwill of the author of the objection, who could decide to change the treaty relations between the two parties at any time. Moreover, the lack of State practice suggests that States and international organizations consider that widening the scope of an objection to a reservation is simply not possible. It might also be argued that any declaration formulated after the prescribed period has elapsed is no longer considered to be an objection properly speaking but a renunciation of a prior acceptance, without regard for the commitment entered into with the reserving State,[1270] and the practice of the Secretary-General as depositary of multilateral treaties appears to bear out this conclusion.[1271]

(4) However, a reading of the provisions of the Vienna Conventions does not justify such a categorical solution. Under article 20, paragraph 5, States and international organizations are given a specific time period within which to make their objections, and there is nothing to

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[1270] See paragraphs (4) and (5) of the commentary to guideline 2.6.15, and guideline 2.8.13.

[1271] See para. (3) of the commentary to guideline 2.6.13.

prevent them from widening or reinforcing their objections during that period; for practical reasons, then, it is appropriate to give States such a period for reflection.

(5) Guideline 2.7.9 strikes a compromise between the two points of view. The Commission considered that the widening of the scope of an objection cannot call into question the very existence of treaty relations between the author of the reservation and the author of the objection. Making a simple objection that does not imply an intention to preclude the entry into force of the treaty between the author of the objection and the author of the reservation may indeed have the immediate effect of establishing treaty relations between the two parties, even before the time period allowed for the formulation of objections has elapsed. To call this *fait accompli* into question by subsequently widening the scope of the objection and accompanying it with a clear expression of intent to preclude the entry into force of the treaty in accordance with article 20, paragraph 4 (b), of the Vienna Convention is inconceivable and seriously undermines legal security.

(6) This compromise solution does not prohibit the widening of the scope of objections within the time period prescribed in guideline 2.6.12 — which simply reproduces the provision contained in article 20, paragraph 5, of the Vienna Conventions — provided that such widening does not call into question the existence of treaty relationships. Widening is thus possible if it is done before the expiry of the twelve-month period (or any other period stipulated in the treaty) that follows notification of the reservation or before the date on which the State or international organization that made the objection expresses its consent to be bound by the treaty, if it is later and if it does not call into question the very existence of treaty relations acquired subsequently through the formulation of the initial objection.

2.8 Formulation of acceptances of reservations

2.8.1 Forms of acceptance of reservations

The acceptance of a reservation may arise from a unilateral statement to this effect or from silence of a contracting State or contracting organization during the periods specified in guideline 2.6.12.

Commentary

(1) In accordance with paragraph 5 of article 20[1272] of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986:

> "For the purposes of paragraphs 2 and 4,[1273] and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period

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[1272] This article is entitled "Acceptance of and objection to reservations". Unlike the English text, the French version of the two Vienna Conventions keeps the word "acceptance" in the singular but leaves "objections" in the plural. This distortion, which appeared in 1962 (see *Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 223 (text adopted by the Drafting Committee); *Yearbook ... 1962*, vol. II, p. 175), was never corrected or explained.

[1273] Paragraph 2 refers to reservations to treaties with limited participation; paragraph 4 establishes the effects of the acceptance of reservations and objections in all cases other than those of reservations expressly authorized by the treaty, treaties with limited participation and constituent acts of international organizations.

> of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."

(2) It emerges from this definition that acceptance of a reservation can be defined as the absence of any objection. With regard to permissible reservations,[1274] acceptance is presumed in principle from the absence of an objection, either at the end of the twelve-month period following receipt of notification of the reservation or at the time of expression of consent to be bound, if it is later. In both cases, which are conceptually distinct but yield identical results in practice, silence is tantamount to acceptance without the need for a formal unilateral declaration. This does not mean, however, that acceptance is necessarily tacit; moreover, paragraphs 1 and 3 of article 23 make explicit reference to "express acceptance of a reservation", and such express formulation may be obligatory, as is implied by the phrase "unless the treaty otherwise provides" in article 20, paragraph 5, even if this phrase was inserted in that provision for other reasons,[1275] and the omission from the same provision of any reference to article 20, paragraph 3, concerning the acceptance of a reservation to the constituent instrument of an international organization, which does indeed require a particular form of acceptance.

(3) Guideline 2.8.1, which opens the section of the Guide to Practice dealing with the procedure and forms of acceptance of reservations, presents two distinct forms of acceptance:

- Express acceptance, resulting from a unilateral statement to that effect; and
- Tacit acceptance, resulting from silence or, more specifically, the absence of any objection to the reservation during a certain period of time. This time period corresponds to the time during which an objection may legitimately be made, *i.e.* the period specified in guideline 2.6.12.

(4) It has been argued nevertheless that this binary distinction between formal acceptances and tacit acceptances of reservations disregards the necessary differentiation between two forms of acceptance without a unilateral statement, which could be either tacit or implicit. Furthermore, according to some authors, reference should be made to "early" acceptance when the reservation is authorized by the treaty:

> "Reservations may be accepted, according to the Vienna Convention, in three ways: in advance, by the terms of the treaty itself or in accordance with article 20 (1)."[1276]

While these distinctions may have some meaning in academic terms, the Commission did not feel that it was necessary to reflect them in the Guide to Practice, given that they did not have any concrete consequences.

(5) With respect to so-called "early" acceptances, the Commission's commentary on draft article 17 (current article 20 of the Vienna Convention) clearly indicates that:

> "Paragraph 1 of this article covers cases where a reservation is expressly or impliedly authorized by the treaty; in other words, where the consent of the other contracting

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[1274] When a reservation is not permissible. acceptance does not affect the permissibility of the reservation; see guideline 3.3.3. It would therefore make little sense to draw a presumption of acceptance from the absence of any objection.

[1275] See paragraph (7) of the commentary to guideline 2.6.12 above.

[1276] D.W. Greig, footnote 28 above, p. 118. This article is perhaps the most thorough study of the rules that apply to the acceptance of reservations (see, in particular, pp. 118–135 and 153).

> States has been given in the treaty. No further acceptance of the reservation by them is therefore required."[1277]

Under this provision, and unless the treaty otherwise provides, an acceptance is not, in this case, a requirement for a reservation to be established: it is established *ipso facto* by virtue of the treaty, and the reaction of States — whether an express acceptance, tacit acceptance or even an objection — can no longer call this acquired acceptance into question. Although this does not prohibit States from expressly accepting a reservation of this kind, such an express acceptance is a redundant act, with no specific effect. Moreover, no examples of such an acceptance exist. This does not mean that article 20, paragraph 1, of the Vienna Conventions should not be reflected in the Guide to Practice; however, the provision has much more to do with the effects of a reservation than with formulation or the form of acceptance; accordingly, it is reproduced in guideline 4.1.1 (Establishment of a reservation expressly authorized by a treaty).

(6) Similarly, the Commission did not feel it appropriate to reflect in the Guide to Practice the distinction made by some authors, based on the two cases provided for in article 20, paragraph 5, of the Vienna Conventions, between "tacit" and "implicit" acceptances, depending on whether or not the reservation has already been formulated at the time the other interested party expresses its consent to be bound. In the former case, the acceptance would be "implicit"; in the latter, it would be "tacit".[1278] In the former case, States or international organizations are deemed to have accepted the reservation if they have raised no objection thereto when they express their consent to be bound by the treaty. In the latter case, the State or international organization has a period of twelve months in which to raise an objection, after which it is deemed to have accepted the reservation.

(7) Although the result is the same in both cases — the State or international organization is deemed to have accepted the reservation if no objection has been raised at a specific time — their grounds are different. With respect to States or international organizations which become contracting States or contracting organizations to a treaty after the formulation of a reservation, the presumption of acceptance is justified not by their silence but rather by the fact that this State or international organization, aware of the reservations formulated,[1279] accedes to the treaty without objecting to the reservations. The acceptance is thus *implied* in the act of ratification of or accession to the treaty, that is, in a positive act which fails to raise objections to reservations already formulated,[1280] hence the notion of "implicit" acceptances. In the case of States or international organizations that have already expressed their consent to be bound by a treaty when the reservation is formulated, however, the situation is different: it is their protracted silence — generally for a period of twelve months — or, more particularly, the absence of any objection on their part that is considered as being the equivalent of an

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[1277] *Yearbook ... 1966*, vol. II, p. 207, para. 18.

[1278] D.W. Greig, footnote 28 above, p. 120; F. Horn, footnote 25 above, pp. 125–126; D. Müller, *Commentaire de l'article 20 (1969)*, footnote 1087 above, p. 816, para. 35; and D. Müller, 1969 Vienna Convention Article 20, footnote 1087 above, p. 501, para. 33.

[1279] See article 23, paragraph 1, of the Vienna Convention of 1986, which stipulates that reservations must be "formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty". See also guideline 2.1.5 and paragraphs (1) to (16) of the commentary thereto.

[1280] See D. Müller, *Commentaire de l'article 20 (1969)*, footnote 1087 above, p. 816, para. 36, and 1969 Vienna Convention Article 20, footnote 1087 above, vol. I, p. 501, para. 34. See also draft article 10, paragraph 5, of J.L. Brierly, [First] Report on the law of treaties, (A/CN.4/23), para. 100; for the English version see *Yearbook ... 1950*, vol. II, p. 241, para. 100.

acceptance of the reservation. This acceptance is therefore inferred only from the silence of the State or international organization concerned; it is tacit.

(8) In fact, this doctrinal distinction is of little real interest. It is sufficient, for practical purposes, to distinguish the States and international organizations which have a period of twelve months to raise an objection from those which, not yet being contracting States or contracting organizations to the treaty at the time the reservation is formulated, have time for reflection until the date on which they express their consent to be bound by the treaty, which nevertheless does not prevent them from formulating an acceptance or an objection before that date.[1281] The question is one of time period, however, and not one of definition.

(9) Another question relates to the very definition of tacit acceptances. One may well ask whether in some cases an objection to a reservation is not tantamount to a tacit acceptance thereof. This paradoxical question stems from the wording of article 20, paragraph 4 (b). That paragraph states:

> "an objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization unless a contrary intention is definitely expressed by the objecting State or organization."

It thus seems to follow that in the event that the author of the objection raises no objection to the entry into force of the treaty between itself and the reserving State, an objection has the same effects as an acceptance of the reservation, at least where the entry into force of the treaty is concerned. This question, which involves much more than purely hypothetical issues, nevertheless primarily concerns the problem of the respective effects of acceptances and objections to reservations.[1282]

(10) Guideline 2.8.1 limits the potential authors of an acceptance to contracting States or contracting organizations alone. The justification for this is to be found in article 20, paragraph 4, which takes into consideration only acceptances made by a contracting State or contracting international organization, and in article 20, paragraph 5, which provides that the presumption of acceptance applies only to contracting States and contracting organizations to the treaty. Thus, a State or an international organization which on the date that notice of the reservation is given is not yet "contracting" to the treaty will be considered as having accepted the reservation only on the date when it expresses its consent to be bound – that is, on the date when it definitively becomes a contracting State or contracting organization.

(11) It is a different matter, however, for acceptances of reservations to the constituent instruments of international organizations referred to in paragraph 3 of the same article on the one hand and express acceptances on the other. In the latter case, there is nothing to prevent a State or an international organization that has not yet expressed its consent to be bound by the treaty from making an express declaration accepting a reservation formulated by another State, even though such an express acceptance cannot produce the same legal effects as those described in article 20, paragraph 4, for acceptances made by contracting States or contracting organizations. The same holds true for any express acceptances by a State or international organization of a reservation to the constituent instrument of an international organization:

[1281] See also paragraphs (8) and (9) of the commentary to guideline 2.6.3 and paragraphs (8) and (9) of guideline 2.6.12 above.

[1282] See guidelines 4.3.1 ("Effects of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation") and 4.3.3 ("Entry into force of the treaty between the author of a reservation and the author of an objection"), and commentaries thereto.

there is nothing to prevent such express acceptances from being formulated, but they cannot produce the same effects as the acceptance of a reservation to a treaty that does not take this form.

(12) Furthermore, it can be seen both from the text of the Vienna Conventions and their *travaux préparatoires* as well as from practice that tacit acceptance is the rule and express acceptance the exception. Guideline 2.8.1, however, is purely descriptive and is not intended to establish cases in which it is possible or necessary to resort to either of the two possible forms of acceptances.

2.8.2 Tacit acceptance of reservations

Unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation within the time period provided for in guideline 2.6.12.

Commentary

(1) Guideline 2.8.2 supplements guideline 2.8.1 by specifying the conditions under which one of the two forms of acceptance of reservations mentioned in the latter provision (absence of any objection by a contracting State or contracting organization) constitutes acceptance of a reservation. It reproduces — with a slight editorial adaptation — the rule expressed in article 20, paragraph 5, of the 1986 Vienna Convention.

(2) How a reservation's permissibility is related to the tacit or express acceptance of a reservation by States and international organizations does not require elucidation in the section of the Guide to Practice concerning procedure. It concerns the effects of reservations, acceptances and objections, which will be the subject of Part 4 of the Guide.

(3) In the Advisory Opinion of the International Court of Justice on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court emphasized that the "very great allowance made to tacit assent to reservations"[1283] characterized international practice, which was becoming more flexible with respect to reservations to multilateral conventions. Although traditionally express acceptance alone had been considered as expressing the consent of the other contracting States to the reservation,[1284] this solution, already outdated in 1951, no longer seemed practicable owing, as the Court stated, to "the very wide degree of participation" in some of these conventions. [1285]

(4) Despite the different opinions expressed by the members of the Commission during the discussion of article 10 of the draft proposed by J.L. Brierly in 1950,[1286] which asserted, to a limited degree,[1287] the possibility of consent to reservations by tacit agreement,[1288]

[1283] *I.C.J. Reports 1951*, footnote 604 above, p. 21.

[1284] P.-H. Imbert, *footnote 25 above*, p. 104. The author refers to the work of D. Kappeler, *Les réserves dans les traités internationaux* (Berlin, Verlag für Recht und Gesellschaft, 1958), pp. 40–41.

[1285] *I.C.J. Reports 1951*, footnote 604 above, p. 21.

[1286] *Yearbook ... 1950*, vol. I, 53rd meeting, 23 June 1950, pp. 92–95, paras. 41 to 84. Mr. El-Khoury argued for the contrary view that the mere silence of a State should not be regarded as implying acceptance but rather as a refusal to accept the reservation (*ibid.*, p. 94, para. 67); this view remained, however, an isolated one.

[1287] Brierly's draft article 10 in fact contemplated only cases of implicit acceptance, that is, cases in which a State accepted all existing reservations to a treaty of which it was aware when it

H. Lauterpacht and G.G. Fitzmaurice also allowed for the principle of tacit acceptance in their drafts.[1289] This should come as no surprise. Under the traditional system of unanimity widely defended by the Commission's first three Special Rapporteurs on the law of treaties, the principle of tacit acceptance was necessary in order to avoid excessive periods of legal uncertainty: in the absence of a presumption of acceptance, the protracted silence of a State party to a treaty could tie up the fate of the reservation and leave the status of the reserving State in relation to the treaty in doubt for an indefinite period, or even prevent the treaty from entering into force for a considerable time.

(5) Yet while the principle of tacit consent is not as imperative under the "flexible" system ultimately adopted by the Commission's fourth Special Rapporteur on the law of treaties, it still has some merits and advantages. Even in his first report, Sir Humphrey Waldock incorporated the principle in the draft articles that he had submitted to the Commission.[1290] He put forward the following explanation for doing so:

> "It is ... true that, under the 'flexible' system now proposed, the acceptance or rejection by a particular State of a reservation made by another primarily concerns their relations with each other, so that there may not be the same urgency to determine the status of a reservation as under the system of unanimous consent. Nevertheless, it seems very undesirable that a State, by refraining from making any comment upon a reservation, should be enabled more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving State ...".[1291]

(6) The provision that would become the future article 20, paragraph 5, was ultimately adopted by the Commission without debate.[1292] During the Vienna Conference of 1968–1969, article 20, paragraph 5, also raised no problem and was adopted with only one change: inclusion of the words[1293] "unless the treaty otherwise provides".[1294]

(7) The work of the Commission on the law of treaties between States and international organizations or between international organizations did not greatly change or challenge the principle of tacit consent. Nevertheless, the Commission had decided to assimilate international organizations to States with regard to the issue of tacit acceptance.[1295] In the

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acceded thereto. For the text of draft article 10, see his report on the law of treaties (A/CN.4/23), *Yearbook ... 1950*, vol. II, pp. 238–242.

[1288] This was actually a matter of implicit acceptance; see paragraph (6) of the commentary to guideline 2.8.1.

[1289] See the summary of the position of the Special Rapporteurs and of the Commission in Humphrey Waldock, first report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, pp. 66–67, para. (14).

[1290] See draft article 18, paragraph 3, of his first report, *ibid.*, p. 61 and pp. 66–68, paras. (14)–(17); reproduced in draft article 19, para. 5, in his fourth report (A/CN.4/177), *Yearbook ... 1965*, vol. II, p. 54–55.

[1291] First report (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 67, para. (15).

[1292] *Yearbook ... 1965*, vol. I 816th meeting, 2 July 1965, pp. 283–284, paras. 43–53; see also P.-H. Imbert, footnote 1289 above, p. 105.

[1293] On the meaning of this part of the provision, see paragraph (11) of the present commentary.

[1294] United States amendment (A/CONF.39/C.1/L.127), *Documents of the Conference*, footnote 54 above, p. 136. Two other amendments which would have deleted the reference to para. 4 (Australia) (A/CONF.39/C.1/L.166, *ibid.*, p. 136) and replaced article 17 with new wording limiting the period for the presumption to six months (Union of Soviet Socialist Republics) (A/CONF.39/C.1/L.115, *ibid.*, p. 133) were either not adopted or withdrawn.

[1295] See draft articles 20 and 20 *bis* adopted on first reading, *Yearbook ... 1977*, vol. II (Part Two), pp. 111–113.

light of criticisms from some States,[1296] the Commission decided to "refrain from saying anything in paragraph 5 of article 20 concerning the problems raised by the protracted absence of any objection by an international organization", but "without thereby rejecting the principle that even where treaties are concerned, obligations can arise for an organization from its conduct".[1297] Draft article 20, paragraph 4, as adopted by the Commission thus reproduced article 20, paragraph 5, of the 1969 Vienna Convention word for word.[1298] During the Vienna Conference, however, the idea of assimilating international organizations to States was reintroduced on the basis of several amendments to that effect[1299] and after thorough debate.[1300]

(8) In line with the position it has taken since adopting paragraph 1 of guideline 1.1 (which reproduces the wording of article 2, paragraph 1 (d), of the 1986 Vienna Convention), the Commission has decided that it is necessary to include in the Guide to Practice a guideline reflecting article 20, paragraph 5, of the 1986 Vienna Convention. The latter provision cannot be reproduced word for word, however, as it refers to other paragraphs in the same article that do not belong in the part of the Guide to Practice having to do with the formulation of reservations, acceptances and objections; the paragraphs 2 and 4 mentioned in paragraph 5 of article 20 relate not to the procedure for formulating reservations but to the conditions under which they produce their effects – in other words, the conditions necessary in order for them to be "established" in the sense of the opening phrase of paragraph 1 of article 21 of the Vienna Conventions.[1301] What is pertinent here is that article 20, paragraph 2, requires unanimous acceptance of reservations to certain treaties; that question is dealt with, from a purely procedural perspective, in guideline 2.8.7 below.

(9) In addition, the adoption of guideline 2.6.12 (Time period for formulating an objection) makes it redundant to repeat in guideline 2.8.2 the specific conditions *ratione temporis* contained in article 20, paragraph 5.[1302] It therefore seemed sufficient for guideline 2.8.2 simply to refer to guideline 2.6.12.

[1296] See *Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.2 (Byelorussian Soviet Socialist Republic), sect. A.12 (Ukrainian Soviet Socialist Republic), sect. A.13 (Union of Soviet Socialist Republics) and sect. C.I (Council for Mutual Economic Assistance); see also the summary by the Special Rapporteur in his tenth report (A/CN.4/341), *Yearbook ... 1981*, vol. II (Part One), p. 61, para. 75.

[1297] See the commentary on draft article 20, *Yearbook ... 1982*, vol. II (Part Two), p. 36, paras. (5) and (6).

[1298] *Yearbook ... 1982*, vol. II (Part Two), p. 35.

[1299] China (A/CONF.129/C.1/L.18, proposing a period of 18 months applicable to States and international organizations), Austria (A/CONF.129/C.1/L.33) and Cape Verde (A/CONF.129/C.1/L.35), *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Official Records, Vienna, 18 February–21 March 1986, vol. II, Documents of the Conference* (A/CONF.129/16/Add.1), pp. 70–71, para. 70. See also the amendment proposed by Australia (A/CONF.129/C.1/L.32), which was ultimately withdrawn but proposed a more nuanced solution (*ibid.*, pp. 70–71, para. 70.B).

[1300] See *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Official Records, Vienna, 18 February–21 March 1986, vol. I, Summary records of the plenary meetings and the meetings of the Committee of the Whole* (A/CONF.129/16), 12th to 14th meetings, 27 and 28 February 1986, pp. 104–114.

[1301] See section 4.1 of the Guide to Practice.

[1302] "For the purposes of paragraphs 2 and 4, and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State *if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later*." (Emphasis added.)

(10) In the Commission's view, this wording also has the advantage of bringing out more clearly the dialectic between (tacit) acceptance and objection – objection excludes acceptance and *vice versa*.[1303] During the Vienna Conference of 1968, the representative of France expressed this idea in the following terms:

> "[A]cceptance and objection are the obverse and reverse sides of the same idea. A State which accepts a reservation thereby surrenders the right to object to it; a State which raises an objection thereby expresses its refusal to accept a reservation."[1304]

(11) The Commission did consider, however, whether the expression "unless the treaty otherwise provides", found in article 20, paragraph 5, of the Vienna Conventions, ought to be retained in guideline 2.8.2. That proviso does not really need to be spelled out, since all the provisions of the Vienna Conventions are of a residuary, voluntary nature.[1305] Moreover, it seems redundant, since the same phrase appears in guideline 2.6.12, where its inclusion is justified by the *travaux préparatoires* for article 20, paragraph 5, of the 1969 Vienna Convention.[1306] The Commission nevertheless decided that it was useful to recall that the rule set out in guideline 2.8.2 applied "unless the treaty otherwise provides", to remain in keeping with the text of the Vienna Conventions.

2.8.3 Express acceptance of reservations

A State or an international organization may, at any time, expressly accept a reservation formulated by another State or international organization.

Commentary

(1) It is certainly true that "the ... acceptance of a reservation is, in the case of multilateral treaties, almost invariably implicit or tacit".[1307] Nevertheless, it can be express, and there are situations in which a State expressly makes known the fact that it accepts the reservation.

(2) The existence of the presumption postulated in article 20, paragraph 5, of the Vienna Conventions in no way prevents States and international organizations from expressly stating their acceptance of reservations that have been formulated. That might seem to be debatable in cases where a reservation does not satisfy the conditions of permissibility established in article 19 of the Vienna Conventions.[1308]

(3) Unlike the reservation itself and unlike an objection, an express acceptance may be declared at any time. This presents no problem for the reserving State, since a State or an international organization that does not expressly accept a reservation will nevertheless be

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[1303] See D. Müller, *Commentaire de l'article 20 (1969)* (footnote 1087 above), pp. 822–823, para. 49; 1969 Vienna Convention Article 20, footnote 1087 above, p. 504, para. 44.

[1304] *First Session, Summary records*, footnote 35 above, 22nd meeting, 11 April 1968, p. 116, para. 14.

[1305] For similar comments on the same issue, see, for example, paragraphs (15) and (16) of the commentary to guideline 2.5.1 (Withdrawal of reservations), which reproduces the provisions of article 22, para. 1, of the 1986 Vienna Convention.

[1306] See paragraph (7) of the commentary to guideline 2.6.12 in Official Records of the General Assembly, Sixty-third Session, Supplement No. 10 (A/63/10), p. 216.

[1307] D.W. Grieg, footnote 28 above, p. 120. In the same sense, see also F. Horn, footnote 25 above, p. 124; L. Lijnzaad, footnote 463 above, p. 46; R. Riquelme Cortado, footnote 150 above, pp. 211 ff; D. Müller, *Commentaire de l'article 20 (1969)*, footnote 1087 above, para. 27; and D. Müller, 1969 Vienna Convention Article 20, footnote 1087 above, vol. I, p. 498, para. 25.

[1308] See paragraph (2) of the commentary to guideline 2.8.2 above.

deemed to have accepted it at the end of the twelve-month period specified in article 20, paragraph 5, of the Vienna Conventions; the consequences of this are considered in guideline 2.8.2.

(4) Even a State or an international organization that has previously raised an objection to a reservation remains free to accept it expressly (or implicitly, by withdrawing its objection) at any time.[1309] This amounts to a complete withdrawal of the objection, which produces the same effects as an acceptance.

(5) In any case, despite these broad possibilities, State practice in the area of express acceptances is practically non-existent. There are only a few isolated examples to be found, and some of those are not without problems.

(6) An example often cited in the literature[1310] is the acceptance by the Federal Republic of Germany of a French reservation, communicated on 7 February 1979, to the 1931 Convention providing a Uniform Law for Cheques. It should be noted, however, that this reservation on the part of the French Republic was formulated late, some 40 years after France's accession to the Convention in question. The German communication[1311] clearly states that the Federal Republic "raises no objections"[1312] to it and thus clearly constitutes an acceptance.[1313] The text of the communication from the Federal Republic of Germany does not make it clear, however, whether it is accepting the deposit of the reservation despite its late formulation[1314] or the content of the reservation itself, or both.

(7) There are other, less ambiguous examples as well, such as the declarations and communications of the United States of America in response to the reservations formulated by Bulgaria,[1315] the Union of Soviet Socialist Republics and Romania to article 21, paragraphs 2 and 3, of the 1954 Convention concerning Customs Facilities for Touring, in which the United States made it clear that it had no objection to those reservations. The United States further stated that it would apply the reservation reciprocally with respect to each of the reserving States,[1316] which it was entitled to do in any case under article 21, paragraph 1 (b), of the Vienna Conventions.[1317] A Yugoslav declaration concerning a reservation by the Soviet Union was similar in intent[1318] but expressly referred to article 20, paragraph 7, of the Convention, relating to the reciprocal application of reservations.[1319] That being said, and

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[1309] See guideline 2.7.1 (Withdrawal of objections to reservations).

[1310] F. Horn, footnote 25 above, p. 124; R. Riquelme Cortado, footnote 150 above, p. 212.

[1311] This communication was issued on 20 February 1980, more than twelve months after the notification of the reservation by the Secretary-General of the United Nations, depositary of the Convention. At that time, in any case, the (new) French reservation was "considered to have been accepted" by Germany on the basis of the principle set out in article 20, paragraph 5, of the Vienna Conventions. Furthermore, the Secretary-General had already considered the French reservation as having been accepted as of 11 May 1979, three months after its deposit. See paragraph (11) of the commentary to guideline 2.3.

[1312] *Multilateral Treaties* ..., Part II, 11.

[1313] In fact, so long as no objection has been raised, the State is considered to have accepted the reservation; see article 20, paragraph 5, of the Vienna Conventions.

[1314] On this point, see guideline 2.3 (Late formulation of reservations) and the commentary thereto.

[1315] Bulgaria ultimately withdrew this reservation. See *Multilateral Treaties* ..., chap. XI-A.6.

[1316] See *ibid.*.

[1317] On the question of reciprocity of reservations, see guideline 4.2.4. See also D. Müller, *Commentaire de l'article 21 (1969)*, footnote 49 above, pp. 901–907, paras. 30–38; Daniel Müller, 1969 Vienna Convention Article 21, footnote 49 above, pp. 548–551, paras. 32–26.

[1318] See *Multilateral Treaties* ..., chap. XI-A.6.

[1319] Article 20, paragraph 7, of the Convention concerning Customs Facilities for Touring provides that "[n]o Contracting State shall be required to extend to a State making a reservation the even if the United States and Yugoslav declarations were motivated by a concern to emphasize the reciprocal application of the reservation and thus refer to article 20, paragraph 7, of the 1954 Convention, the fact remains that they are without a doubt express acceptances. The same holds true in the case of the United States declarations regarding the reservations of Romania and the Soviet Union to the 1949 Convention on Road Traffic,[1320] which are virtually identical to the United States declarations relating to the Convention concerning Customs Facilities for Touring, notwithstanding the fact that the 1949 Convention does not include a provision comparable to article 20, paragraph 7, of the 1954 Convention.[1321]

(8) In the absence of any significant practice in the area of express acceptances, one must rely almost exclusively on the provisions of the Vienna Conventions and their *travaux préparatoires* to work out the principles and rules for formulating express acceptances and the procedures applicable to them.

2.8.4 Form of express acceptance of reservations

The express acceptance of a reservation must be formulated in writing.

Commentary

(1) Article 23, paragraph 1, of the 1986 Vienna Convention provides:

> "A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty."

(2) The *travaux préparatoires* for this provision were analysed in connection with guidelines 2.1.1 and 2.1.5.[1322] It is thus unnecessary to duplicate that general presentation, except to recall that the question of form and procedure for acceptance of reservations was touched upon only incidentally during the elaboration of the 1969 Vienna Convention.

(3) As in the case of objections, this provision places express acceptances on the same level as reservations themselves in matters concerning written form and communication with the States and international organizations involved. For the same reasons as those given for objections, it is therefore sufficient, in the context of the Guide to Practice, to take note of this convergence of procedures and to stipulate in a separate guideline, for the sake of clarity, that an express acceptance must by definition[1323] be in written form.

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benefit of the provisions to which such reservation applies", and that "[a]ny State availing itself of this right shall notify the Secretary-General accordingly".

[1320] *Multilateral Treaties* ..., chap. XI-B.1. The declarations by Greece and the Netherlands concerning the Russian reservation are considerably less clear in that they limit themselves to stating that the two Governments "do not consider themselves bound by the provisions to which the reservation is made, as far as the Soviet Union is concerned" (*ibid.*). Nevertheless, this effect might be produced by an acceptance as well as by an objection.

[1321] Article 54, paragraph 1, of the 1949 Convention on Road Traffic simply provides for the reciprocity of a reservation concerning article 52 (Settlement of disputes), without requiring a declaration to that effect on the part of States accepting the reservation.

[1322] See paragraphs (2) to (7) of the commentary to guideline 2.1.1 and paragraphs (5) to (11) of the commentary to guideline 2.1.5; see also paragraphs (3) and (4) of the commentary to guideline 2.1.6.

[1323] See guideline 2.8 and commentary thereto, in particular paragraphs (2) and (3).

(4) Despite appearances, guideline 2.8.4 can in no way be considered superfluous. The mere fact that an acceptance is express does not necessarily imply that it is in writing. The written form is not only called for by article 23, paragraph 1, of the Vienna Conventions, from which the wording of guideline 2.8.4 is taken, but is also necessitated by the importance of acceptances to the legal regime of reservations to treaties, in particular their permissibility and effects. Although the various proposals of the Special Rapporteurs on the law of treaties never specifically required that express acceptances must be in writing, it can be seen from their work that they always leaned towards the maintenance of a certain formality. Sir Humphrey Waldock's various proposals and drafts require that an express acceptance should be made in the instrument, or by any other appropriate formal procedure, at the time of ratification or approval by the State concerned, or, in other cases, by formal notification; hence a written version would be required in every case. Following the simplification and reworking of the articles concerning the form and procedure for reservations, express acceptances and objections, the Commission decided to include the matter of written form in draft article 20, paragraph 1 (which became article 23, paragraph 1). The harmonization of provisions applicable to the written form and to the procedure for formulating reservations, objections and express acceptances did not give rise to debate in the Commission or at the Vienna Conference.

2.8.5 Procedure for formulating express acceptance of reservations

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 apply *mutatis mutandis* to express acceptances.

Commentary

(1) Guideline 2.8.5 is, in a sense, the counterpart of guideline 2.6.8 on objection procedure and is based on the same rationale.[1324] It is clear from the work of the Commission that culminated in the wording of article 23 of the Vienna Convention that reservations, express acceptances and objections are all subject to the same rules of notification and communication.[1325]

2.8.6 Non-requirement of confirmation of an acceptance formulated prior to formal confirmation of a reservation

An express acceptance of a reservation formulated by a State or an international organization prior to confirmation of the reservation in accordance with guideline 2.2.1 does not itself require confirmation.

[1324] See the commentary to guideline 2.6.8.

[1325] See in particular the proposal of Mr. Rosenne, *Yearbook ... 1965*, vol. II, p. 73, and *ibid.*, vol. I, 803rd meeting, 16 June 1965, pp. 197–199, paras. 30–56. See also *Yearbook ... 1966*, vol. II, p. 276, paragraph (1) of the commentary to draft article 73. For a summary of the work of the International Law Commission, see A. Pellet and W. Schabas, *Commentaire de l'article 23 (1969)*, in *Les Conventions de Vienne ...*, footnote 450 above, p. 974, para. 5; A. Pellet and W. Schabas, 1969 Vienna Convention Article 23, in Olivier Corten and Pierre Klein (eds.), *The Vienna Conventions on the Law of Treaties ...*, vol. I, footnote 450 above, p. 596, para. 5.

Commentary

(1) Even though the practice of States with regard to the confirmation of express acceptances formulated prior to the confirmation of reservations appears to be non-existent, article 23, paragraph 3, of the Vienna Conventions[1326] clearly states:

> "An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation."

(2) As the Commission already noted with regard to the confirmation of objections,[1327] this is a common-sense rule that has been reproduced in guideline 2.8.6 in a form adapted to the logic of the Guide to Practice:

- It is limited to the confirmation of acceptances and does not refer to objections;[1328] and
- Instead of containing the formulation "made previously to confirmation of the reservation", it refers to guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty).[1329]

(3) On the other hand, it would seem inappropriate to include in the Guide to Practice a guideline on express acceptance of reservations that was analogous to guideline 2.6.11 (Requirement of confirmation of an objection formulated prior to the expression of consent to be bound by a treaty). Not only is the idea of formulating an acceptance prior to the expression of consent to be bound by the treaty excluded by the very wording of article 20, paragraph 5, of the Vienna Conventions, which allows the formulation of acceptances only by contracting States or international organizations,[1330] but it is also difficult in practice to imagine that a State or international organization would actually formulate such an acceptance. In any case, such a practice (which would be tantamount to soliciting reservations) should surely be discouraged, and would not serve the purpose of "advance objections": namely, the advance "warning" given to States and international organizations seeking to formulate reservations unacceptable to the objecting State.

2.8.7 Unanimous acceptance of reservations

In the event of a reservation requiring unanimous acceptance by some or all States or international organizations which are parties or entitled to become parties to the treaty, such acceptance, once obtained, is final.

Commentary

(1) The time period for tacit acceptance of a reservation by States or international organizations that are entitled to become parties to the treaty is subject to a further limitation

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[1326] Concerning the *travaux préparatoires* to this provision, see paragraph (1) of the commentary to guideline 2.6.11.

[1327] See paragraphs (4) to (6) of the commentary to guideline 2.6.11.

[1328] On the question of the (non-)confirmation of objections, see guideline 2.6.10 (Non-requirement of confirmation of an objection formulated prior to formal confirmation of a reservation).

[1329] "If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation."

[1330] See paragraph (10) of the commentary to guideline 2.8.1.

when unanimous acceptance is necessary in order to establish a reservation. That limitation is established in guideline 2.8.7.

(2) *A priori*, article 20, paragraph 5, of the Vienna Conventions seems to mean that the general rule applies when unanimity is required: paragraph 5 explicitly refers to article 20, paragraph 2, which requires acceptance of a reservation by all parties to a treaty with limited participation. However, that interpretation would have unreasonable consequences. Allowing States and international organizations that are entitled to become parties to the treaty but have not yet expressed their consent to be bound by the treaty when the reservation is formulated to raise an objection on the date that they become parties to the treaty (even if this date is later than the date on which the objection is notified) would have extremely damaging consequences for the reserving State and, more generally, for the stability of treaty relations. The reason for this is that in such a scenario it could not be presumed, at the end of the twelve-month period, that a State that was a signatory of, but not a party to, a treaty with limited participation had agreed to the reservation, and that situation would prevent unanimous acceptance, even if the State had not formally objected to the reservation. The application of the presumption implicit in article 20, paragraph 5, would thus have exactly the opposite effect to the one desired, *i.e.*, the rapid stabilization of treaty relations and of the standing of the reserving State or international organization *vis-à-vis* the treaty.

(3) This issue was addressed by Sir Humphrey Waldock in the draft article 18 presented in his first report, which drew a clear distinction between tacit acceptance and implicit acceptance in the case of multilateral treaties (subject to the "flexible" system) on the one hand and plurilateral treaties (subject to the traditional system of unanimity) on the other. Indeed, paragraph 3 (c) of that draft article stipulated that:

> "A State which acquires the right to become a party to a treaty after a reservation has already been formulated[1331] shall be presumed to consent to the reservation:
>
> (i) In the case of a plurilateral treaty, if it executes the act or acts necessary to enable it to become a party to the treaty;
>
> (ii) In the case of a multilateral treaty, if it executes the act or acts necessary to qualify it to become a party to the treaty without signifying its objection to the reservation."[1332]

(4) Sir Humphrey also noted, with reference to the scenario envisaged in paragraph 3 (c) (i), in which unanimity remains the rule, that lessening the rigidity of the twelve-month rule for States that are not already parties to the treaty:

> "… is not possible in the case of plurilateral treaties because there the delay in taking a decision does place in suspense the status of the reserving State *vis-à-vis* all the States participating in the treaty".[1333]

(5) It follows that wherever unanimity remains the rule, a State or international organization that accedes to the treaty may not validly object to a reservation that has already been accepted by all the States and international organizations that are already parties to the treaty, once the period of twelve months from the time it received notification of the

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[1331] "Made" would undoubtedly be more appropriate: if the period within which an objection can be raised following the *formulation* of a reservation has not yet elapsed, there is no reason why the new contracting State could not object.

[1332] *Yearbook … 1962*, vol. II, p. 61.

[1333] *Ibid.*, p. 67, para. (16) of the commentary.

reservation has elapsed. This does not mean, however, that the State or international organization may never object to the reservation: it may do so within the stipulated time period as a State entitled to become a party to the treaty.[1334] If, however, it has not taken that step and subsequently accedes to the treaty, it has no choice but to consent to the reservation.

(6) Guideline 2.8.7 says nothing about situations in which a State or an international organization is prevented from objecting to a reservation at the time that it accedes to the treaty. It merely notes that, when the special conditions imposed by the treaty are fulfilled, the particular reservation is established and cannot be called into question through an objection.

(7) The reference to "some" States or international organizations is intended to cover the scenario in which the requirement of acceptance is limited to certain parties. That might be the case, for example, if a treaty establishing a nuclear-weapon-free zone stipulated that reservations could be established only if all nuclear-weapon States that were parties to the treaty accepted them; the subsequent accession of another nuclear Power would not call into question a reservation thus made.

2.8.8 Acceptance of a reservation to the constituent instrument of an international organization

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

Commentary

(1) Article 20, paragraph 3, of the Vienna Conventions has the same wording:

> "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization."

(2) This provision originated in the first report of Sir Humphrey Waldock, who proposed a draft article 18, paragraph 4 (c), which read as follows:

> "In the case of a plurilateral or multilateral treaty which is the constituent instrument of an international organization, the consent of the organization, expressed through a decision of its competent organ, shall be necessary to establish the admissibility of a reservation not specifically authorized by such instrument and to constitute the reserving State a party to the instrument."[1335]

The same idea was taken up in the Special Rapporteur's fourth report, but the wording of draft article 19, paragraph 3, was simpler and more concise:

[1334] As to the limited effect of such an objection, see guideline 2.6.3, subparagraph (ii), and commentary thereto.

[1335] A/CN.4/144 (footnote 1289 above), p. 61. See also draft article 20, paragraph 4, as adopted by the Commission on first reading, which restated the principle of intervention of the competent organ of an organization but which appeared to subsume it under cases in which an objection had effectively been raised against the reservation concerned (*Yearbook ... 1962*, vol. II, p. 176 and p. 181, para. (25) of the commentary to draft article 20).

> "Subject to article 3 (*bis*) [the origin of the current article 5], when a treaty is a constituent instrument of an international organization, acceptance of a reservation shall be determined by the competent organ of the international organization."[1336]

(3) The very principle of recourse to the competent organ of an international organization for a ruling on the acceptance of a reservation made regarding its constituent instrument was severely criticized at the 1969 Vienna Conference, in particular by the Soviet Union, which said:

> "Paragraph 3 of the Commission's article 17 should also be deleted, since the sovereign right of States to formulate reservations could not be made dependent on the decisions of international organizations."[1337]

(4) Other delegations, while less hostile to the principle of intervention by an organization's competent organ in accepting a reservation to its constituent instrument, were of the view that this particular regime was already covered by what would become article 5 of the 1969 Vienna Convention. Article 5 does in fact make the 1969 Vienna Convention applicable to the constituent instruments of international organizations "without prejudice to any relevant rules of the organization", including provisions concerning the admission of new members or the assessment of reservations that may arise.[1338] Nevertheless, the provision was adopted by the Vienna Conference in 1986.[1339]

(5) The commentary to the draft articles on the law of treaties between States and international organizations or between international organizations also clearly shows that article 5 of the Convention and article 20, paragraph 3, of are neither mutually exclusive nor redundant. In fact, it was after the reintroduction, following much hesitation, of a provision corresponding to article 5 of the 1969 Vienna Convention, which had been initially omitted, that it appeared necessary to the Commission to also reintroduce paragraph 3 of article 20 in the draft which led to the 1986 Convention.[1340]

(6) In principle, recourse to the competent organ of an organization for acceptance of reservations formulated with regard to the constituent instrument of that organization is perfectly logical. The constituent instruments of international organizations do not by nature lend themselves to the flexible system.[1341] Their main objective is the establishment of a new juridical person, and in that context a diversity of bilateral relations between member States or

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[1336] A/CN.4/177, *Yearbook ... 1965*, vol. II, p. 50.

[1337] *First Session, Summary records*, (footnote 35 above), 21st meeting, 10 April 1968, p. 107, para. 6.

[1338] See the Swiss amendment (A/CONF.39/C.1/L.97, *Documents of the Conference*, (footnote 54 above), p. 135) and the joint amendment by France and Tunisia (A/CONF.39/C.1/L.113, *ibid.*). See also interventions by France (*First Session, Summary records*, footnote 35 above, 22nd meeting, 11 April 1968, p. 116, para. 16); by Switzerland (*ibid.*, 21st meeting, 10 April 1968, p. 111, para. 40), by Tunisia (*ibid.*, para. 45), and by Italy (*ibid.*, 22nd meeting, 11 April 1968, p. 120, para. 77). In the same sense, see P.-H. Imbert, footnote 25 above, p. 122; and M.H. Mendelson, "Reservations to the Constitutions of International Organizations", *British Year Book of International Law*, 1971, p. 151.

[1339] *Summary records* ... (A/CONF.129/16), vol. I, 27th meeting, 12 March 1986, p. 187, para. 14.

[1340] *Yearbook ... 1982*, vol. II (Part Two), p. 36, para. (3) of the commentary to draft article 20. See also the debate within the Commission, *Yearbook ... 1982*, vol. I, 1727th meeting, 15 June 1982, pp. 177–178.

[1341] M.H. Mendelson has demonstrated that "[t]he charter of an international organization differs from other treaty regimes in bringing into being, as it were, a living organism, whose decisions, resolutions, regulations, appropriations and the like constantly create new rights and obligations for the members" (M.H. Mendelson, footnote 1338 above, p. 148).

organizations is essentially inconceivable. There cannot be numerous types of "membership", much less numerous decision-making procedures. The practical value of the principle is particularly obvious if one tries to imagine a situation in which a reserving State is considered a "member" of the organization by some of the other States members and, at the same time, as a third party in relation to the organization and its constituent instrument by other States that have made a qualified objection opposing the entry into force of the treaty in their bilateral relations with the reserving State.[1342] A solution of this sort, creating a hierarchy among or a bilateralization of the organization's membership, would paralyse the work of the international organization in question and so would be unacceptable. Accordingly, the Commission, basing itself largely on the practice of the Secretary-General in the matter, rightly noted in its commentary to draft article 20, paragraph 4, adopted on first reading, that:

> "… in the case of instruments which form the constitutions of international organizations, the integrity of the instrument is a consideration which outweighs other considerations and that it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable."[1343]

(7) Furthermore, it is only logical that States or member organizations should take a collective decision concerning acceptance of a reservation, given that they take part, through the competent organ of the organization, in the admissions procedure for all new members and must assess at that time the terms and extent of commitment of the State or organization applying for membership. It is thus up to the organization, and to it alone, and more particularly to the competent organ, to interpret its own constituent instrument and to decide on the acceptance of a reservation formulated by a candidate for admission.

(8) This principle is confirmed, moreover, by practice in the matter. Despite some variation in the practice of depositaries other than the Secretary-General of the United Nations,[1344] the latter clearly sets out his position in the case of the Indian reservation to the Convention on the Inter-Governmental Maritime Consultative Organization (IMCO).[1345] On that occasion, it was specifically stated that the Secretary-General "has invariably treated the matter as one for reference to the body having the authority to interpret the convention in question".[1346] However, there are very few examples of acceptances by the competent organ of the organization concerned to be found in the collection *Multilateral Treaties Deposited with the Secretary-General*, particularly as the depositary does not generally communicate acceptances. Yet it is worth noting that the reservations formulated by the Federal Republic of Germany and the United Kingdom to the Agreement establishing the African Development Bank as amended in 1979 were expressly accepted by the Bank.[1347] Similarly, the French

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[1342] See D. Müller, *Commentaire de l'article 20 (1969)*, footnote 1087 above, p. 854, para. 106 and 1969 Vienna Convention Article 20, footnote 1087 above, p. 522, para. 85; M.H. Mendelson, footnote 1338 above, pp. 149 and 150–151.

[1343] *Yearbook … 1962*, vol. II, p. 181, para. (25) of the commentary to draft article 20.

[1344] For example, the United States of America has always applied the principle of unanimity for reservations to constituent instruments of international organizations (see the examples given by M. Mendelson, footnote 1338 above, p. 149, and pp. 158–160, and P.-H. Imbert, footnote 25 above, pp. 122–123 (footnote 186)), while the United Kingdom has embraced the Secretary-General's practice of referring the question back to the competent organ of the organization concerned (*ibid.*, p. 121).

[1345] See M.H. Mendelson, footnote 1338 above, pp. 162–169, and P.-H. Imbert, footnote 25 above, pp. 123–125.

[1346] See document A/4235, para. 21. See also *Yearbook … 1965*, vol. II, para. 22, and *Summary of Practice of the Secretary-General …*, footnote 75 above, pp. 59–60, paras. 197–198.

[1347] *Multilateral Treaties …*, chap. X.2.b.

reservation to the 1977 Agreement establishing the Asia-Pacific Institute for Broadcasting Development was expressly accepted by the Institute's Governing Council.[1348] Chile's instrument of ratification of the 1983 Statutes of the International Centre for Genetic Engineering and Biotechnology also took effect on the date that the reservations formulated in that instrument were accepted by the Centre's Board of Governors.[1349]

(9) In keeping with its usual practice, the Commission therefore considered it necessary to reproduce article 20, paragraph 3, of the Vienna Conventions in guideline 2.8.8 in order to stress the special nature of the rules applicable to the constituent instruments of international organizations with regard to the acceptance of reservations.

2.8.9 Organ competent to accept a reservation to a constituent instrument

Subject to the rules of the organization, competence to accept a reservation to a constituent instrument of an international organization belongs to the organ competent to:

- decide on the admission of a member to the organization; or
- amend the constituent instrument; or
- interpret this instrument.

Commentary

(1) The question of determining which organ is competent to decide on the acceptance of a reservation is not answered either in the Vienna Conventions themselves or in their *travaux préparatoires*. It was therefore thought useful to indicate in the Guide to Practice what is meant by the "competent organ" of an organization for the purposes of applying article 20, paragraph 3, of the Vienna Conventions, the wording of which is reproduced in guideline 2.8.8.

(2) The silence of the Vienna Conventions on this point is easily explained: it is impossible to determine in a general and abstract way which organ of an international organization is competent to decide on the acceptance of a reservation. This question is covered by the "without prejudice" clause in article 5, according to which the provisions of the Conventions apply to constituent instruments of international organizations "without prejudice to any relevant rules of the organization".

(3) It is thus the rules of the organization that determine the organ competent to accept the reservation, as well as the applicable voting procedure and required majorities. If the rules are silent on this point, given the circumstances in which a reservation can be formulated, it can be assumed that "competent organ" means the organ that decides on the reserving State's application for admission or the organ competent to amend the constituent instrument of the organization or to interpret it, although the Commission has not been able to determine a hierarchy among those different organs.

(4) The wide diversity of practice has not been of much help in this regard. For example, the Indian "reservation" to the IMCO Constitution — once the controversy over the procedure to be followed was resolved[1350] — was accepted by the IMCO Council under article 27 of the

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[1348] *Ibid.*, chap. XXV.3.

[1349] *Ibid.*, chap. XIV.7.

[1350] See M.H. Mendelson, footnote 1338 above, pp. 162–169, and P.-H. Imbert, footnote 25 above, pp. 123–125.

Convention,[1351] whereas the Turkish reservation to the same Convention was (implicitly) accepted by the Assembly. With regard to the reservation by the United States of America to the Constitution of the World Health Organization (WHO), the Secretary-General referred the matter to the World Health Assembly, which was competent under article 75 of the Constitution to decide on any disputes with regard to the interpretation of that instrument. In the end, the Assembly unanimously accepted the United States reservation.[1352]

2.8.10 Modalities of the acceptance of a reservation to a constituent instrument

1. Subject to the rules of the organization, the acceptance by the competent organ of the organization shall not be tacit. However, the admission of the State or the international organization which is the author of the reservation is tantamount to the acceptance of that reservation.

2. For the purposes of the acceptance of a reservation to the constituent instrument of an international organization, the individual acceptance of the reservation by States or international organizations that are members of the organization is not required.

Commentary

(1) Guideline 2.8.10 sets out, in a single provision, the consequences of the principle laid down in article 20, paragraph 3, of the Vienna Conventions and reproduced in guideline 2.8.7:

> 1. The principle that, with but one exception, the acceptance of a reservation by the competent organ of the organization must be express; and
>
> 2. The fact that this acceptance is necessary but sufficient and that, consequently, individual acceptance of the reservation by the member States is not required.

(2) Article 20, paragraph 3, of the Vienna Conventions is scarcely more than a "safeguard clause"[1353] that excludes the case of constituent instruments of international organizations from the scope of the flexible system, including the principle of tacit acceptance,[1354] while specifying that acceptance by the competent organ is necessary to "establish" the reservation within the meaning of article 21, paragraph 1, of the Vienna Conventions. Moreover, as guidelines 2.8.8 and 2.8.9 show, article 20, paragraph 3, is far from resolving all the problems that can arise with regard to the legal regime applicable to reservations to constituent instruments: not only does it not define either the notion of a constituent instrument or the competent organ which must decide, but it also fails to say anything about the modalities of the organ's acceptance of reservations.

(3) One thing is certain, however: the acceptance by the competent organ of an international organization of a reservation to its constituent instrument cannot be presumed. Under article 20, paragraph 5, of the Vienna Conventions, the presumption that a reservation is accepted at the end of a twelve-month period applies only to the cases described in

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[1351] Under this provision, the Council assumes the functions of the organization if the Assembly does not meet.

[1352] Concerning this case see, in particular, M.H. Mendelson, footnote 1338 above, pp. 161–162. For other examples, see paragraph (8) of the commentary to guideline 2.8.7.

[1353] D. Müller, Commentaire de l'article 20 (1969) footnote 1087 above, p. 858, para. 114; 1969 Vienna Convention Article 20, footnote 1087 above, p. 523, para. 88.

[1354] Article 20, paragraph 5, of the Vienna Conventions excludes from its scope the case of reservations to constituent instruments of international organizations, specifying that it applies solely to the situations referred to in paragraphs 2 and 4 of article 20.

paragraphs 2 and 4 of that article. Thus the case set out in article 20, paragraph 3, is excluded, which is tantamount to saying that unless the treaty (in this case, the constituent instrument of the organization) otherwise provides, acceptance must necessarily be express.

(4) In practice, even leaving aside the problem of the twelve-month period stipulated in article 20, paragraph 5, of the Vienna Conventions, which would be difficult, if not impossible, to respect in some organizations where the organs competent to decide on the admission of new members meet only at intervals of more than twelve months,[1355] the failure by the competent organ of the organization concerned to take a position is scarcely conceivable in view of the very special nature of constituent instruments. In any case, an organ of the organization must at some time or another take a position on the admission of a new member that wishes to accompany its accession to the constituent instrument with a reservation; without such a decision, the State cannot be considered a member of the organization. Even if the admission of the State in question is not subject to a formal act of the organization but is simply reflected in accession to the constituent instrument, article 20, paragraph 3, of the Vienna Conventions requires that the competent organ rule on the question.

(5) It is possible, however, to imagine cases in which the organ competent to decide on the admission of a State implicitly accepts the reservation by allowing the candidate State to participate in the work of the organization without formally ruling on the reservation.[1356] The phrase "[s]ubject to the rules of the organization" at the beginning of paragraph 1 of the guideline is designed to introduce some additional flexibility into the principle stated in the guideline.

(6) The fact remains that there is one exception to the rule of tacit acceptance prescribed in article 20, paragraph 5, of the Vienna Conventions and reproduced in guideline 2.8.1. It therefore seems useful to recall in a separate guideline that the presumption of acceptance does not apply with regard to the constituent instruments of international organizations, at least as far as acceptance expressed by the competent organ of the organization is concerned.

(7) The inevitable logical consequence of the principle established in article 20, paragraph 3, of the Vienna Conventions and the exception it introduces to the general principle of tacit acceptance is that acceptance of the reservation by contracting States or international organizations is not a prerequisite for the establishment of the reservation. This is the idea expressed in paragraph 2 of guideline 2.8.10. It does not mean that contracting States or international organizations are precluded from formally accepting the reservation in question if they so wish. It follows from guideline 2.8.12 that acceptance will simply not produce the effects normally attendant upon such a declaration.

[1355] One example is the case of the General Assembly of the World Tourism Organization (WTO) which, under article 10 of its Statutes, meets only every other year.

[1356] See the example of the reservation formulated by Turkey to the IMCO Convention. This reservation was not officially accepted by the Assembly. Nonetheless, the Assembly allowed the Turkish delegation to participate in its work. This implied acceptance of the instrument of ratification and the reservation (W.W. Bishop, footnote 288 above, pp. 297–298; M.H. Mendelson, footnote 1338 above, p. 163). Technically, however, this is not a "tacit" acceptance as Mendelson seems to think (*ibid.*), but rather an "implicit" acceptance (concerning this distinction see paragraph (6) of the commentary to guideline 2.8.1).

2.8.11 Acceptance of a reservation to a constituent instrument that has not yet entered into force

In the case set forth in guideline 2.8.8 and where the constituent instrument has not yet entered into force, a reservation is considered to have been accepted if no signatory State or signatory international organization has raised an objection to that reservation within a period of twelve months after they were notified of that reservation. Such a unanimous acceptance, once obtained, is final.

Commentary

(1) A particular problem arises with regard to reservations to the constituent instrument of an organization in cases where the competent organ does not yet exist because the treaty may not yet have entered into force or the organization may not yet have been established. In this respect, guideline 2.8.11 clarifies article 20, paragraph 3, of the Vienna Conventions on a matter which may seem to be of minor importance, but which has posed certain fairly substantial difficulties in certain cases in the past.

(2) This situation occurred with respect to the Convention establishing the International Maritime Organization (IMO)[1357] — at the time still the Intergovernmental Maritime Consultative Organization (IMCO) — to which some States had formulated reservations or declarations in their instruments of ratification,[1358] and with respect to the Constitution of the International Refugee Organization, which the United States of America, France and Guatemala intended to ratify with reservations,[1359] before the respective constituent instruments of the two organizations had entered into force. The Secretary-General of the United Nations, in his capacity as depositary of these conventions and unable to submit the question of declarations and/or reservations to the International Refugee Organization (as it did not yet exist), decided to consult the States most immediately concerned — in other words, the States that were already parties to the Convention — and, in the absence of any objections, to admit the reserving States as members of the organization.[1360]

(3) It should also be noted that, while article 20, paragraph 3, of the Vienna Conventions precludes the application of the "flexible" system in the case of reservations to a constituent instrument of an international organization, it does not place it under the traditional system of unanimity. The practice of the Secretary-General, however, which is to consult all the States that are already parties to the constituent instrument, leans in that direction. Had it been adopted, an Austrian amendment to this provision, submitted at the Vienna Conference, would have led to a different solution:

[1357] United Nations, *Treaty Series*, vol. 289, p. 3.

[1358] See, in particular, the declarations of Switzerland, the United States of America, Mexico and Ecuador (*Multilateral Treaties …*, chap. XII.1).

[1359] These declarations are cited in P.-H. Imbert, footnote 25 above, p. 40 (note 6).

[1360] M.H. Mendelson (footnote 1338 above), pp. 162–163. In this same spirit, the United States of America, during the Vienna Conference, proposed replacing article 20, paragraph 3, with the following text: "When a treaty is a constituent instrument of an international organization, it shall be deemed to be of such a character that, pending its entry into force, and the functioning of the organization, a reservation may be established if none of the signatory States objects, unless the treaty otherwise provides." (See A/CONF.39/C.1/L.3 and *Summary Records* A/CONF.39/11, footnote 35 above, 24th meeting, 16 April 1968, pp. 130–131, para. 54). This amendment, which was not adopted, would have considerably enlarged the circle of States entitled to decide.

> "When the reservation is formulated while the treaty is not yet in force, the expression of the consent of the State which has formulated the reservation takes effect only when such competent organ is properly constituted and has accepted the reservation."[1361]

This approach, which was not followed by the Drafting Committee at the time of the Conference,[1362] is supported by M.H. Mendelson, who considers, moreover, that "[t]he fact that ... the instrument containing the reservations should not count towards bringing the treaty into force, is a small price to pay for ensuring the organization's control over reservations".[1363]

(4) The organization's control over the question of reservations is certainly one advantage of the solution advocated by the Austrian amendment. Nevertheless, the undeniable disadvantage of this solution — which was rejected by the Vienna Conference — is that it leaves the reserving State in what can be a prolonged undetermined status with respect to the organization, until such time as the treaty enters into force. One might well ask, then, whether the practice of the Secretary-General does not constitute a more reasonable solution. Indeed, asking States that are already parties to the constituent instrument to assess the reservation with a view to obtaining unanimous acceptance (absence of protest or objection) places the reserving State in a more comfortable situation. Its status with respect to the constituent instrument of the organization and with respect to the organization itself is determined much more rapidly.[1364] It should be borne in mind, moreover, that the organization's consent is nothing more than the sum total of the acceptances of the States members of the organization. Requiring unanimity before the competent organ comes into being can, of course, put the reserving State at a disadvantage, since in most cases — at least in the case of international organizations having a global mandate — a decision will probably be taken by majority vote. Nevertheless, if there is no unanimity among the contracting States or international organizations, there is nothing to prevent the author of the reservation from resubmitting its instrument of ratification and accompanying reservation to the competent organ of the organization once it is established.

(5) Both solutions seem to yield an identical outcome. The difference, however — and it is not negligible — is that the reserving State is spared an intermediate and uncertain status until such time as the organization is established and its reservation can be examined by the competent organ. This is a major advantage from the standpoint of legal certainty.

(6) The Commission has pondered the question of which States and international organizations should be called upon to decide on the fate of a reservation in such circumstances. It seemed to the Commission that allowing only contracting States and international organizations to do so could, in some cases, unduly facilitate the establishment of

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[1361] A/CONF.39/C.1/L.3, in *Documents of the Conference*, footnote 54 above, p. 135. An amendment was very much along these lines, but could have meant that the reserving State becomes a party to the instrument regardless. It stipulated that "When the reservation is made before the entry into force of the treaty, the reservation shall be subject to subsequent acceptance by the competent organ after such competent organ has been properly instituted." (A/CONF.39/C.1/L.162, *ibid.*, p. 135).

[1362] M.H. Mendelson, footnote 1338 above, pp. 152–153. See *Documents of the Conference*, footnote 54 above, pp. 137–138 and 240.

[1363] M.H. Mendelson, footnote 1338 above, p. 153.

[1364] The example of the Argentine reservation to the constituent instrument of the International Atomic Energy Agency (IAEA) shows that the status of the reserving State can be determined very rapidly and depends essentially on the depositary (the United States of America in this case). The Argentine instrument was accepted after a period of only three months. See M.H. Mendelson, footnote 1338 above, p. 160.

a reservation since, ultimately, a single contracting State could seal its fate. For this reason, the Commission finally settled on the States and international organizations signatories of the constituent instrument. It is understood that the term "signatory" means those that are signatories at the time the reservation is formulated.

(7) The clarification in the last sentence of the guideline that "[s]uch a unanimous acceptance once obtained is final" is intended to ensure the stability of the legal situation resulting from acceptance. It is predicated on the same rationale as that underlying guideline 2.8.7. Generally speaking, the rules relating to acceptance continue to apply here, and the reservation must be deemed to have been accepted if no signatory State or signatory international organization has objected to it within the twelve-month period stipulated in guideline 2.6.12.

(8) Although it seemed unnecessary to spell out such details in the guideline itself, the Commission considers that if the constituent act enters into force during the twelve-month period in question, guideline 2.8.11 is no longer applicable, and it is the general rule laid down in guideline 2.8.8 that shall apply.

(9) In any event, it seems desirable that during the negotiations States or international organizations should come to an agreement on a *modus vivendi* for the period of uncertainty between the time of signature and the entry into force of the constituent instrument, for example, by transferring the competence necessary to accept or reject reservations to the interim committee responsible for setting up the new international organization.[1365]

2.8.12 Reaction by a member of an international organization to a reservation to its constituent instrument

Guideline 2.8.10 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.

Commentary

(1) According to the terms of paragraph 2 of guideline 2.8.10, "[f]or the purposes of the acceptance of a reservation to the constituent instrument of an international organization, the individual acceptance of the reservation by States or international organizations that are members of the organization is not required". However, as explained in the commentary to that provision,[1366] this principle does not mean that "contracting States or international organizations are precluded from formally accepting the reservation in question if they so wish". Guideline 2.8.11 confirms this point.

[1365] This solution was contemplated by the Secretary-General of the United Nations in a document prepared for the Third United Nations Conference on the Law of the Sea. In his report, the Secretary-General stated that "before entry into force of the Convention on the Law of the Sea, it would of course be possible to consult a preparatory commission or some organ of the United Nations" (A/CONF.62/L.13, *Official Records of the United Nations Conference on the Law of the Sea (third session)*, vol. VI, p. 128, footnote 26). For a brief discussion of the difficulty, in certain circumstances, of determining the "organ qualified to accept a reservation", see the second paragraph of guideline 2.1.5 (Communication of reservations) and paragraphs (28) and (29) of the commentary.

[1366] Para. (7).

(2) The answer to the question of whether the competence of the organ of the organization to rule on the acceptance of a reservation to the constituent instrument precludes individual reactions by other members of the organization may seem obvious. Why allow States to express their individual views if they must make a collective decision on acceptance of the reservation within the competent organ of the organization? Would that not give the green light to a reopening of the debate on the reservation, particularly for States that had been unable to "impose" their point of view within the competent organ, thereby creating a dual or parallel system of acceptance of such reservations that would in all likelihood create an impasse if the two processes led to different outcomes?

(3) During the Vienna Conference, the United States of America introduced an amendment to article 17, paragraph 3 (which became article 20, paragraph 3), specifying that "such acceptance shall not preclude any Contracting State from objecting to the reservation".[1367] Adopted by a slim majority at the 25th meeting of the Committee of the Whole[1368] and incorporated by the Drafting Committee in the provisional text of article 17, this passage was ultimately deleted from the final text of the Convention by the Committee of the Whole "on the understanding that the question of objections to reservations to constituent instruments of international organizations formed part of a topic already before the International Law Commission [the question of relations between international organizations and States], and that meanwhile the question would continue to be regulated by general international law".[1369] It became apparent in the work of the Drafting Committee that the formulation of the US amendment was not very clear and left open the question of the legal effects of such an objection.[1370]

(4) In truth, it is hard to understand why member States or international organizations could not take individual positions on a reservation outside the framework of the international organization and communicate their views to the interested parties, including the organization. In all likelihood, taking such a position would probably have no concrete legal effect; however, it has happened more than once, and the absence of a legal effect *stricto sensu* of such declarations does not rob them of their importance[1371] – they provide an opportunity for the reserving State, in the first instance, and subsequently for other interested States to become aware of and assess the position of the State that is the author of the unilaterally formulated acceptance or objection, and this might ultimately make a useful contribution to the debate within the competent organ of the organization and form the basis for launching a "reservations dialogue" among the protagonists. Such a position could also be taken into consideration, where appropriate, by a third party who might have to decide on the permissibility or scope of the reservation.

(5) In the Commission's opinion, guideline 2.8.12, which does not question the necessary and sufficient nature of the acceptance of a reservation by the competent organ of the international organization,[1372] is in no way contrary to the Vienna Conventions, which take no position on the matter.

[1367] A/CONF.39/C.1/L.127, *Documents of the Conference*, footnote 54 above, p. 135, para. 179.iv.d.

[1368] By 33 votes to 22, with 29 abstentions, *First Session, Summary Records* (A/CONF.39/11), footnote 35 above, 25th meeting, 16 April 1968, p. 135, para. 32.

[1369] *Documents of the Conference*, footnote 54 above, pp. 137–138, para. 186.

[1370] *First Session, Summary Records*, footnote 35 above, 72nd meeting, 15 May 1968, pp. 425–426, paras. 4–14.

[1371] See also paragraph (30) of the commentary to guideline 2.6.1.

[1372] See article 20, paragraph 3, of the Vienna Conventions and guideline 2.8.8.

2.8.13 Final nature of acceptance of a reservation

The acceptance of a reservation cannot be withdrawn or amended.

Commentary

(1) Although they deal with objections, neither the 1969 nor the 1986 Vienna Convention contains provisions concerning the withdrawal of the acceptance of a reservation. They neither authorize it nor prohibit it.

(2) The fact remains that article 20, paragraph 5, of the Vienna Conventions and its *ratio legis* logically exclude calling into question a tacit (or implicit) acceptance through an objection formulated once the twelve-month time period stipulated in that paragraph (or of any other time period specified by the treaty in question) has elapsed: to allow a "change of heart" that might call into question the treaty relations between the States or international organizations concerned many years after an acceptance had taken effect because a contracting State or an international organization had remained silent until one of the "critical dates" had passed would pose a serious threat to legal certainty. While States parties are completely free to express their disagreement with a reservation after the end of the twelve-month period (or of any other time period specified by the treaty in question), their late "objections" can no longer have the normal effects of an objection, as provided for in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions. A comparable conclusion must be drawn with regard to the question of widening the scope of an objection to a reservation.

(3) There is no reason to approach express acceptances any differently. Without having to undertake an in-depth analysis of the effects of an express acceptance — which are no different from those of a tacit acceptance — suffice it to say that, like tacit acceptances, the effect of such an express acceptance should in theory be the entry into force of the treaty between the reserving State or international organization and the State or international organization that has accepted the reservation and even, in certain circumstances, among all States or international organizations parties to the treaty. It goes without saying that to call the legal consequences into question *a posteriori* would seriously undermine legal certainty and the status of the treaty in the bilateral relations between the author of the reservation and the author of the acceptance. This is certainly true where acceptance has been made expressly: even if there is no doubt that a State's silence in a situation where it should have expressed its view has legal effects by virtue of the principle of good faith (and, here, the express provisions of the Vienna Conventions), it is even more obvious when the State's position takes the form of a unilateral declaration; the reserving State, as well as the other States parties, can count on the manifestation of the will of the State author of the express acceptance.

(4) The dialectical relationship between objection and acceptance, established and affirmed by article 20, paragraph 5, of the Vienna Conventions, and the imposition of controls on the objection mechanism with the aim of stabilizing the treaty relations that have been disturbed, in a sense, by the reservation necessarily imply that acceptance (whether tacit or express) is final. This is the principle firmly stated in guideline 2.8.13 in the interests of the certainty of treaty-based legal relations.

2.9 Formulation of reactions to interpretative declarations

2.9.1 Approval of an interpretative declaration

"Approval" of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization expresses agreement with the interpretation formulated in that declaration.

Commentary

(1) It appears that practice with respect to positive reactions to interpretative declarations is virtually non-existent, as if States considered it prudent not to expressly approve an interpretation given by another party. This may be due to the fact that article 31, paragraph 3 (a), of the Vienna Conventions provides that, for the interpretation of a treaty,

> "There shall be taken into account, together with the context:
>
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."

(2) The few instances of express reactions that can be found combine elements of approval and disapproval or have a conditional character, subordinating approval of the initial interpretation to ... the interpretation given to it by the reacting State.

(3) For example, the *Multilateral Treaties deposited with the Secretary-General* include the text of a reaction by Israel to a declaration submitted by the Arab Republic of Egypt[1373] concerning the United Nations Convention on the Law of the Sea that is drafted in a positive fashion, even though it is probably an expression of disagreement or a warning:

> "The concerns of the Government of Israel, with regard to the law of the sea, relate principally to ensuring maximum freedom of navigation and overflight everywhere and particularly through straits used for international navigation.
>
> In this regard, the Government of Israel states that the regime of navigation and overflight, confirmed by the 1979 Treaty of Peace between Israel and Egypt, in which the Strait of Tiran and the Gulf of Aqaba are considered by the Parties to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight, is applicable to the said areas. Moreover, being fully compatible with the United Nations Convention on the Law of the Sea, the regime of the Peace Treaty will continue to prevail and to be applicable to the said areas.

[1373] "The provisions of the 1979 Peace Treaty between Egypt and Israel concerning passage through the Strait of Tiran and the Gulf of Aqaba come within the framework of the general regime of waters forming straits referred to in part III of the Convention, wherein it is stipulated that the general regime shall not affect the legal status of waters forming straits and shall include certain obligations with regard to security and the maintenance of order in the State bordering the strait" (*Multilateral Treaties* ..., chap. XXI.6).

> It is the understanding of the Government of Israel that the declaration of the Arab Republic of Egypt in this regard, upon its ratification of the [said] Convention, is consonant with the above declaration."[1374]

It appears from this declaration that the interpretation put forward by Egypt is regarded by Israel as correctly reflecting the meaning of chapter III of the Montego Bay Convention, assuming that it is itself compatible with the Israeli interpretation. The Egyptian interpretation is, in a manner of speaking, confirmed by the reasoned "approbatory declaration" made by Israel.

(4) Another example that can be cited is the reaction of the Government of Norway to a declaration made by France concerning the 1978 Protocol relating to the 1973 International Convention for the Prevention of Pollution from Ships, published by the Secretary-General of the International Maritime Organization:

> "the Government of Norway has taken due note of the communication, which is understood to be a declaration on the part of the Government of France and not a reservation to the provisions of the Convention with the legal consequence such a formal reservation would have had, if reservations to Annex I had been admissible".[1375]

It appears that this statement may be interpreted to mean that Norway accepts the French declaration insofar as (and on the condition that) it does not constitute a reservation.

(5) Even though examples are lacking, it is clear that a situation may arise in which a State or an international organization simply expresses its agreement with a specific interpretation proposed by another State or international organization in an interpretative declaration. Such agreement between the respective interpretations of two or more parties corresponds to the situation contemplated in article 31, paragraph 3 (a), of the Vienna Conventions,[1376] it being unnecessary at the present stage to specify the weight that should be given to this "subsequent agreement between the parties regarding the interpretation of the treaty".[1377]

(6) It is sufficient to note that such agreement with an interpretative declaration is not comparable to acceptance of a reservation, if only because under article 20, paragraph 4, of the Vienna Conventions such acceptance entails the entry into force of the treaty for the reserving State – which is evidently not the case of a positive reaction to an interpretative declaration. To underscore the differences between the two, the Commission thought it would be wise to use different terms. The term "approval", which expresses the idea of agreement or acquiescence without prejudging the legal effect actually produced,[1378] is used to denote a positive reaction to an interpretative declaration.

[1374] *Ibid.* In fact, this statement expresses approval of both the classification and the substance of the Egyptian declaration; given the wording of these declarations, one may wonder whether they might not have been made as a result of a diplomatic agreement.

[1375] *Status of Multilateral Conventions and Instruments in respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions (as of 31 December 2007)*, p. 108 (note 1).

[1376] See paragraph (1) of the present commentary.

[1377] See section 4.7 below.

[1378] See J. Salmon (ed.), *Dictionnaire de droit international public*, footnote 1016 above, pp. 74–75 (Approbation, 1).

2.9.2 Opposition to an interpretative declaration

"Opposition" to an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization disagrees with the interpretation formulated in the interpretative declaration, including by formulating an alternative interpretation.

Commentary

(1) Examples of negative reactions to an interpretative declaration, in other words, of a State or an international organization disagreeing with the interpretation given in an interpretative declaration, while not quite as exceptional as positive reactions, are nonetheless sporadic. The reaction of the United Kingdom of Great Britain and Northern Ireland to the interpretative declaration of the Syrian Arab Republic[1379] in respect of article 52 of the 1969 Vienna Convention is an illustration of this:

> "The United Kingdom does not accept that the interpretation of Article 52 put forward by the Government of Syria correctly reflects the conclusions reached at the Conference of Vienna on the subject of coercion; the Conference dealt with this matter by adopting a Declaration on this subject which forms part of the Final Act."[1380]

(2) The various conventions on the law of the sea also generated negative reactions to the interpretative declarations made in connection with them. Upon ratification of the Convention on the Continental Shelf, concluded in Geneva in 1958, Canada declared "... that it does not find acceptable the declaration made by the Federal Republic of Germany with respect to article 5, paragraph 1".[1381]

(3) The United Nations Convention on the Law of the Sea, by virtue of its articles 309 and 310, which prohibit reservations but authorize interpretative declarations, gave rise to a considerable number of "interpretative declarations", which also prompted an onslaught of negative reactions by other contracting States. Tunisia, for example, in its communication of 22 February 1994, made it known that:

> "… in that declaration [of Malta], articles 74 and 83 of the Convention are interpreted to mean that, in the absence of any agreement on delimitation of the exclusive economic zone, the continental shelf or other maritime zones, the search for an equitable solution assumes that the boundary is the median line, in other words, a line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial waters is measured.

[1379] This declaration reads as follows: "D – The Government of the Syrian Arab Republic interprets the provisions in article 52 as follows:

> The expression 'the threat or use of force' used in this article extends also to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests" (*Multilateral Treaties* ..., chap. XXIII.1).

[1380] *Ibid.*

[1381] *Ibid.*, chap. XXI.4. The German interpretative declaration reads as follows: "The Federal Republic of Germany declares with reference to article 5, para. 1, of the Convention on the Continental Shelf that in the opinion of the Federal Government, article 5, para. 1, guarantees the exercise of fishing rights (*Fischerei*) in the waters above the continental shelf in the manner hitherto generally in practice" (*ibid.*).

> "The Tunisian Government believes that such an interpretation is not in the least consistent with the spirit and letter of the provisions of these articles, which do not provide for automatic application of the median line with regard to delimitation of the exclusive economic zone or the continental shelf."[1382]

Another clear-cut example can be found in the statement of Italy regarding India's interpretative declaration in respect of the Montego Bay Convention:

> "Italy wishes to reiterate the declaration it made upon signature and confirmed upon ratification according to which 'the rights of the coastal State in such zone do not include the right to obtain notification of military exercises or manoeuvres or to authorize them'. According to the declaration made by Italy upon ratification, this declaration applies as a reply to all past and future declarations by other States concerning the matters covered by it."[1383]

(4) Examples can also be found in the practice relating to conventions adopted within the Council of Europe. Thus, the Russian Federation, referring to numerous declarations by other States parties in respect of the 1995 Framework Convention for the Protection of National Minorities in which they specified the meaning to be ascribed to the term "national minority", declared that it:

> "... considers that none is entitled to include unilaterally in reservations or declarations, made while signing or ratifying the Framework Convention for the Protection of National Minorities, a definition of the term 'national minority', which is not contained in the Framework Convention. In the opinion of the Russian Federation, attempts to exclude from the scope of the Framework Convention the persons who permanently reside in the territory of States parties to the Framework Convention and previously had a citizenship but have been arbitrarily deprived of it, contradict the purpose of the Framework Convention for the Protection of National Minorities".[1384]

(5) Furthermore, the example of the statement by Italy regarding India's interpretative declaration[1385] shows that, in practice, States that react negatively to an interpretative declaration formulated by another State or another international organization often propose in the same breath another interpretation that they believe is "more accurate". This practice of "constructive" refusal was also followed by Italy in its statement in reaction to the interpretative declarations of several other States parties to the March 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal:

> "The Government of Italy, in expressing its objection *vis-à-vis* the declarations made, upon signature, by the Governments of Colombia, Ecuador, Mexico, Uruguay and Venezuela, as well as other declarations of similar tenour that might be made in the future, considers that no provision of this Convention should be interpreted as restricting navigational rights recognized by international law. Consequently, a State

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[1382] *Ibid.*, chap. XXI.6. The relevant part of the Maltese declaration reads as follows: "The Government of Malta interprets article 74 and article 83 to the effect that in the absence of agreement on the delimitation of the exclusive economic zone or the continental shelf or other maritime zones, for an equitable solution to be achieved, the boundary shall be the median line, namely a line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial waters of Malta and of such other States is measured" (*ibid.*, chap. XXI.6).

[1383] *Ibid.*, chap. XXI.6.

[1384] *European Treaty Series*, No. 157 (available at http://conventions.coe.int).

[1385] See paragraph (3) above.

> party is not obliged to notify any other State or obtain authorization from it for simple passage through the territorial sea or the exercise of freedom of navigation in the exclusive economic zone by a vessel showing its flag and carrying a cargo of hazardous wastes."[1386]

Germany and Singapore, which had made interpretative declarations comparable to that of Italy, remained silent in respect of declarations interpreting the Basel Convention differently without deeming it necessary to react in the same way as the Italian Government.[1387]

(6) The practice also evoked reactions that, *prima facie*, were not outright rejections. In some cases, States seemed to accept the proposed interpretation on the condition that it was consistent with a supplementary interpretation.[1388] The conditions set by Germany, Poland and Turkey for consenting to Poland's interpretative declaration in respect of the European Convention on Extradition of 13 December 1957[1389] offer a good example of this. Germany, for example, considered:

> "the placing of persons granted asylum in Poland on an equal standing with Polish nationals in Poland's declaration with respect to Article 6, paragraph 1 (a), of the Convention to be compatible with the object and purpose of the Convention only with the proviso that it does not exclude extradition of such persons to a State other than that in respect of which asylum has been granted".[1390]

(7) A number of States had a comparable reaction to the declaration made by Egypt upon ratification of the 1997 International Convention for the Suppression of Terrorist Bombings.[1391] Considering that the declaration by the Arab Republic of Egypt "aims ... to extend the scope of the Convention" — which excludes assigning the status of "reservation"[1392] — the German Government declared that it:

> "is of the opinion that the Government of the Arab Republic of Egypt is only entitled to make such a declaration unilaterally for its own armed forces, and it interprets the declaration as having binding effect only on armed forces of the Arab Republic of Egypt. In the view of the Government of the Federal Republic of Germany, such a unilateral declaration cannot apply to the armed forces of other States Parties without their express consent. The Government of the Federal Republic of Germany therefore declares that it does not consent to the Egyptian declaration as so interpreted with regard to any armed forces other than those of the Arab Republic of Egypt, and in

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[1386] *Multilateral Treaties* ..., chap. XXVII.3.

[1387] On the question of "silence", see guideline 2.9.9 and the commentary thereto.

[1388] This practice coincides with the practice described above of partial or conditional approval (see paragraphs (3) to (5) of the commentary to guideline 2.9.1).

[1389] Declaration of 15 June 1993: "The Republic of Poland declares, in accordance with para. 1 (a) of Article 6, that it will under no circumstances extradite its own nationals. The Republic of Poland declares that, for the purposes of this Convention, in accordance with para. 1 (b) of Article 6, persons granted asylum in Poland will be treated as Polish nationals" (*European Treaty Series*, No. 024 (http://conventions.coe.int)).

[1390] See also the identical reaction of Austria to the interpretative declaration of Romania (*ibid.*).

[1391] The Egyptian "reservation" is formulated as follows: "The Government of the Arab Republic of Egypt declares that it shall be bound by article 19, para. 2, of the Convention to the extent that the armed forces of a State, in the exercise of their duties, do not violate the norms and principles of international law" (*Multilateral Treaties* ..., chap. XVIII.9).

[1392] See paragraphs (9) and (10) of the commentary to guideline 1.5.

> particular does not recognize any applicability of the Convention to the armed forces of the Federal Republic of Germany".[1393]

(8) In the context of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (MARPOL PROT 1978), a declaration by Canada concerning Arctic waters also triggered conditional reactions.[1394] France, Germany, Greece, Italy, the Netherlands, Portugal, Spain and the United Kingdom of Great Britain and Northern Ireland declared that they:

> "take [ ] note of this declaration by Canada and consider [ ] that it should be read in conformity with Articles 57, 234 and 236 of the United Nations Convention on the Law of the Sea. In particular, the … Government recalls that Article 234 of that Convention applies within the limits of the exclusive economic zone or of a similar zone delimited in conformity with Article 57 of the Convention and that the laws and regulations contemplated in Article 234 shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence".

(9) The Czech declaration made further to the interpretative declaration of the Federal Republic of Germany[1395] in respect of Part X of the Montego Bay Convention should be viewed from a slightly different perspective in that it is difficult to determine whether it is opposing the interpretation upheld by Germany or recharacterizing the declaration as a reservation:

> "The Government of the Czech Republic having considered the declaration of the Federal Republic of Germany of 14 October 1994 pertaining to the interpretation of the provisions of Part X of the [said Convention], which deals with the right of access of land-locked States to and from the sea and freedom of transit, states that the [said] declaration of the Federal Republic of Germany cannot be interpreted with regard to the Czech Republic in contradiction with the provisions of Part X of the Convention."[1396]

(10) Such "conditional acceptances" do not constitute "approvals" within the meaning of guideline 2.9.1 and must be regarded as negative reactions. In fact, the authors of such declarations are not approving the proposed interpretation but rather are putting forward another which, in their view, is the only one in conformity with the treaty.

[1393] *Ibid.* See also comparable declarations by the United States of America (*ibid.*), the Netherlands (*ibid.*), the United Kingdom (*ibid.*) and Canada (*ibid.*).

[1394] For the text of the Canadian declaration, see *Status of Multilateral Conventions and Instruments in respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions* (as of 31 December 2007), p. 106.

[1395] The relevant part of the German declaration reads as follows: "As to the regulation of the freedom of transit enjoyed by landlocked States, transit through the territory of transit States must not interfere with the sovereignty of these States. In accordance with article 125, para. 3, the rights and facilities provided for in Part X in no way infringe upon the sovereignty and legitimate interests of transit States. The precise content of the freedom of transit has in each single case to be agreed upon by the transit State and the landlocked State concerned. In the absence of such agreement concerning the terms and modalities for exercising the right of access of persons and goods to transit through the territory of the Federal Republic of Germany is only regulated by national law, in particular, with regard to means and ways of transport and the use of traffic infrastructure" (*Multilateral Treaties …*, chap. XXI.6).

[1396] *Ibid.*

(11) All these examples show that a negative reaction to an interpretative declaration can take varying forms: it can be an out and out rejection of the interpretation formulated in the declaration, a counter-proposal for an interpretation of the contested provision(s), or an attempt to limit the scope of the initial declaration, which was in turn interpreted. In any case, reacting States or international organizations are seeking to prevent or limit the scope of the interpretative declaration or its legal effect on the treaty, its application or its interpretation. In this connection, then, a negative reaction is somewhat comparable to an objection to a reservation without, however, producing the same effect. Thus, a State or an international organization cannot oppose the entry into force of a treaty between itself and the author of the interpretative declaration on the pretext that it disagrees with the interpretation contained in the declaration. The author views its negative reaction as a safeguard measure, a protest against the establishment of an interpretation of the treaty that could be used against it, and against which it must speak out, as it considers it to be inappropriate.[1397]

(12) This is why, just as it preferred the term "approval" to "acceptance" to designate a positive reaction to an interpretative declaration,[1398] the Commission decided to use the term "opposition",[1399] rather than "objection", to refer to a negative reaction, even though this word has sometimes been used in practice.[1400]

(13) The Commission considered how it might most appropriately designate oppositions that reflected a different interpretation than the one contained in the initial interpretative declaration. It rejected the adjectives "incompatible" and "inconsistent", choosing instead the word "alternative" so as not to constrict the definition to oppositions to interpretative declarations unduly.

(14) Adhering strictly to the subject matter of the second part, the definition selected avoids any reference to the possible effects of either interpretative declarations themselves or reactions to them. Guidelines are formulated in respect of both of these in Part 4 of the Guide to Practice.[1401]

(15) The Commission also found that, contrary to the approach it had taken when drafting guideline 2.6.1 on the definition of objections to reservations, it was not advisable to include in the definition of oppositions to interpretative declarations a reference to the intention of the author of the reaction, which was felt to be too subjective.

[1397] In this connection, see A. McNair, *The Law of Treaties* (Oxford, Clarendon, 1961), pp. 430 and 431.

[1398] See guideline 2.9.1.

[1399] The definition of "opposition" thus understood is very similar to the definition of the term "protestation" as provided in the *Dictionnaire de droit international public*: "Act by which one or more subjects of international law express their intention not to recognize the validity or opposability of acts, conduct or claims issuing from third parties" (footnote 1016 above, p. 907).

[1400] See, for example, Italy's reaction to the interpretative declarations of Colombia, Ecuador, Mexico, Uruguay and Venezuela to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (See *Multilateral Treaties* ..., chap. XXVII.3). Canada's reaction to the interpretative declaration of the Federal Republic of Germany to the Geneva Convention on the Continental Shelf (see *ibid.*, chap. XXI.4) was also registered in the "objection" category by the Secretary-General.

[1401] See in particular guideline 4.7.1 (Clarification of the terms of the treaty by an interpretative declaration).

2.9.3 Recharacterization of an interpretative declaration

1. "Recharacterization" of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization purports to treat the declaration as a reservation.

2. A State or an international organization that intends to treat an interpretative declaration as a reservation should take into account guidelines 1.3 to 1.3.3.

Commentary

(1) Even though in certain respects the recharacterization of an interpretative declaration as a reservation resembles an opposition to the initial interpretation, it constitutes a sufficiently distinct manifestation of a divergence of opinion to warrant devoting a separate guideline to it. This is the subject matter of guideline 2.9.3.

(2) As the definitions of reservations and interpretative declarations make clear, the naming or phrasing of a unilateral statement by its author as a "reservation" or an "interpretative declaration" is irrelevant for the purposes of characterizing such a unilateral statement,[1402] even if it provides a significant clue[1403] as to its nature. This principle is conveyed by the phrase "however phrased or named" in guideline 1.1 (replicating article 2, paragraph 1 (d), of the Vienna Conventions).

(3) What frequently occurs in practice is that interested States do not hesitate to react to unilateral statements which their authors call interpretative, and to expressly regard them as reservations.[1404] These reactions, which might be called "recharacterizations" to reflect their purpose, in no way resemble approval or opposition, since they (obviously) do not refer to the actual content of the unilateral statement in question but rather to its form and to the applicable legal regime.

(4) There are numerous examples of this phenomenon:

(a) The reaction of the Netherlands to Algeria's interpretative declaration in respect of article 13, paragraphs 3 and 4, of the 1966 International Covenant on Economic, Social and Cultural Rights:

> "In the opinion of the Government of the Kingdom of the Netherlands, the interpretative declaration concerning article 13, paragraphs 3 and 4, of the International Covenant on Economic, Social and Cultural Rights must be regarded as a reservation to the Covenant. From the text and history of the Covenant, it follows that the reservation with respect to article 13, paragraphs 3 and 4, made by the Government of Algeria is incompatible with the object and purpose of the Covenant. The Government of the Kingdom of the Netherlands therefore considers the reservation unacceptable and formally raises an objection to it."[1405]

[1402] See also guidelines 1.1 (Definition of reservations) and 1.2 (Definition of interpretative declarations).

[1403] In this connection, guideline 1.3.2 (Phrasing and name) provides that: "The phrasing or name given to a unilateral declaration is an indication of the purported legal effect ..."

[1404] Nor do the tribunals or treaty monitoring bodies hesitate to recharacterize an interpretative declaration as a reservation (see paragraphs (5) to (7) of the commentary to guideline 1.3.2).

[1405] *Multilateral Treaties* ..., chap. IV.3. See also the objection of Portugal (*ibid.*) and the objection of the Netherlands to the declaration of Kuwait (*ibid.*).

(b) The reactions of many States to the declaration made by Pakistan with respect to the same Covenant of 1966, which, after lengthy statements of reasons, conclude:

> "The Government of … therefore regards the above-mentioned declarations as reservations and as incompatible with the object and purpose of the Covenant.
>
> The Government of … therefore objects to the above-mentioned reservations made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights. This objection shall not preclude the entry into force of the Covenant between the Federal Republic of Germany and the Islamic Republic of Pakistan."[1406]

(c) The reactions of many States to the declaration made by the Philippines with respect to the 1982 Montego Bay Convention:

> "The … considers that the statement which was made by the Government of the Philippines upon signing the United Nations Convention on the Law of the Sea and confirmed subsequently upon ratification of that Convention in essence contains reservations and exceptions to the said Convention, contrary to the provisions of article 309 thereof."[1407]

(d) The recharacterization formulated by Mexico, which considered that:

> "… the third declaration [formally classified as interpretative] submitted by the Government of the United States of America … constitutes a unilateral claim to justification, not envisaged in the Convention [the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances], for denying legal assistance to a State that requests it, which runs counter to the purposes of the Convention".[1408]

(e) The reaction of Germany to a declaration whereby the Government of Tunisia indicated that it would not, in implementing the Convention on the Rights of the Child of 20 November 1989, "adopt any legislative or statutory decision that conflicts with the Tunisian Constitution":

> "The Federal Republic of Germany considers the first of the declarations deposited by the Republic of Tunisia to be a reservation. It restricts the application of the first sentence [*sic*] of article 4 … ."[1409]

(f) The reactions of 19 States to the declaration made by Pakistan with regard to the 1997 International Convention for the Suppression of Terrorist Bombings, whereby Pakistan specified that "nothing in this Convention shall be applicable to struggles, including armed struggle, for the realization of right of self-determination launched against any alien or foreign occupation or domination":

> "The Government of Austria considers that the declaration made by the Government of the Islamic Republic of Pakistan is in fact a reservation that seeks to

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[1406] *Ibid.* See also the objections registered by Denmark (*ibid.*), Finland (*ibid.*), France (*ibid.*), Latvia (*ibid.*), the Netherlands (*ibid.*), Norway (*ibid.*), Spain (*ibid.*), Sweden (*ibid.*) and the United Kingdom of Great Britain and Northern Ireland (*ibid.*).

[1407] Belarus, *ibid.*, chap. XXI.6; see also the reactions similar in letter or in spirit from Australia, Bulgaria, the Russian Federation and Ukraine (*ibid.*).

[1408] *Ibid.*, chap. VI.19.

[1409] *Ibid.*, chap. IV.11.

> limit the scope of the Convention on a unilateral basis and is therefore contrary to its objective and purpose ... ."[1410]

(g) The reactions of Germany and the Netherlands to the declaration made by Malaysia upon accession to the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, whereby Malaysia made the implementation of article 7 of the Convention subject to its domestic legislation:

> "The Government of the Federal Republic of Germany considers that in making the interpretation and application of Article 7 of the Convention subject to the national legislation of Malaysia, the Government of Malaysia introduces a general and indefinite reservation that makes it impossible to clearly identify in which way the Government of Malaysia intends to change the obligations arising from the Convention. Therefore the Government of the Federal Republic of Germany hereby objects to this declaration which is considered to be a reservation that is incompatible with the object and purpose of the Convention. This objection shall not preclude the entry into force of the Convention between the Federal Republic of Germany and Malaysia;"[1411]

(h) The reaction of Sweden to the declaration by Bangladesh indicating that article 3 of the 1953 Convention on the Political Rights of Women could only be implemented in accordance with the Constitution of Bangladesh:

> "In this context the Government of Sweden would like to recall, that under well-established international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty. Thus, the Government of Sweden considers that the declarations made by the Government of Bangladesh, in the absence of further clarification, in substance constitute reservations to the Convention.
>
> The Government of Sweden notes that the declaration relating to article III is of a general kind, stating that Bangladesh will apply the said article in consonance with the relevant provisions of its Constitution. The Government of Sweden is of the view that this declaration raises doubts as to the commitment of Bangladesh to the object and purpose of the Convention and would recall that, according to well-established international law, a reservation incompatible with the object and purpose of a treaty shall not be permitted."[1412]

(5) These examples show that recharacterization consists of considering that a unilateral statement submitted as an "interpretative declaration" is in reality a "reservation", with all the legal effects that this entails. Thus, recharacterization seeks to identify the legal status of the unilateral statement in the relationship between the State or organization having submitted the statement and the "recharacterizing" State or organization. As a general rule, such

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[1410] *Ibid.* chap. XVIII.9. See the reactions similar in letter or in spirit from Australia, Canada, Denmark, Finland, France, Germany, India, Israel, Italy, Japan, the Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom and the United States (*ibid.*). See also the reactions of Germany and the Netherlands to the unilateral declaration made by Malaysia (*ibid.*).

[1411] *Ibid.*, chap. XVIII.7.

[1412] *Ibid.* chap. XVI.1. See also the identical declaration by Norway (*ibid.*).

declarations, which are usually extensively reasoned,[1413] are based essentially on the criteria for distinguishing between reservations and interpretative declarations.[1414]

(6) These recharacterizations are "attempts", proposals made with a view to qualifying as a reservation a unilateral statement which its author has submitted as an interpretative declaration and to imposing on it the legal status of a reservation. However, it should be understood that a "recharacterization" does not in and of itself determine the status of the unilateral statement in question. A divergence of views between the States or international organizations concerned can be resolved only through the intervention of an impartial third party with decision-making authority. The last phrase of paragraph 1 of guideline 2.9.3 ("whereby the former State or organization treats the declaration as a reservation") clearly establishes the subjective nature of such a position, which does not bind either the author of the initial declaration or the other contracting or concerned parties.

(7) The second paragraph of guideline 2.9.3 refers the reader to guidelines 1.3 to 1.3.3, which indicate the criteria for distinguishing between reservations and interpretative declarations and the method of implementing them.

(8) Even though contracting States and international organizations are free to react to the interpretative declarations of other parties, which is why paragraph 2 is worded in the form of a recommendation, as evidenced by the conditional verb "should", they are taking a risk if they fail to follow these guidelines, which should guide the position of any decision-making body competent to give an opinion on the matter.

2.9.4 Right to formulate approval or opposition, or to recharacterize

An approval, opposition or recharacterization in respect of an interpretative declaration may be formulated at any time by any contracting State or any contracting organization and by any State or any international organization that is entitled to become a party to the treaty.

Commentary

(1) In keeping with the basic principle of consensualism, guideline 2.9.4 conveys the wide range of possibilities open to States and international organizations in reacting to an interpretative declaration, whether they accept it, oppose it or consider it to be an actual reservation.

(2) With respect to time frames, reactions to interpretative declarations may in principle be formulated at any time. Interpretation occurs throughout the life of the treaty, and there does not seem to be any reason why reactions to interpretative declarations should be confined to any specific time frame when the declarations themselves are not, as a general rule (and if the treaty does not otherwise provide), subject to any particular time frame.[1415]

(3) Moreover, and here reactions to interpretative declarations resemble acceptances of and objections to reservations, both contracting States and contracting international organizations and States and international organizations that are entitled to become parties to the treaty

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[1413] For a particularly striking example, see the reactions to Pakistan's interpretative declaration in relation to the International Covenant on Economic, Social and Cultural Rights (see paragraph 4 (b) above and *Multilateral Treaties ...*, chap. IV.3).

[1414] See guidelines 1.3 to 1.3.3.

[1415] See paragraphs (21) to (32) of the commentary to guideline 1.2 and also guideline 2.4.4 and commentary thereto.

should be able to formulate an express reaction to an interpretative declaration at least from the time they become aware of it, on the understanding that the author of the declaration is responsible for disseminating it (or not)[1416] and that the reactions of non-contracting States or non-contracting international organizations will not necessarily produce the same legal effect as those formulated by contracting States or contracting organizations (and most likely no effect at all so long as the author State or international organization has not expressed its consent to be bound). It is thus perfectly logical that the Secretary-General should have accepted Ethiopia's communication of its opposition to the interpretative declaration formulated by the Yemen Arab Republic with respect to the Montego Bay Convention, even though Ethiopia had not ratified the Convention.[1417]

2.9.5 Form of approval, opposition and recharacterization

An approval, opposition or recharacterization in respect of an interpretative declaration should preferably be formulated in writing.

Commentary

(1) While reactions to interpretative declarations differ considerably from acceptances of or objections to reservations, it seems appropriate to ensure, to the extent possible, that such reactions are publicized widely, on the understanding that States and international organizations have no legal obligation in this regard[1418] but that any legal effects that they may expect to arise from such reactions will depend in large part on how widely they disseminate those reactions.

(2) Although the legal effects of such reactions (combined with those of the initial declaration) on the interpretation and application of the treaty in question will not be discussed at the present stage,[1419] it goes without saying that such unilateral statements are likely to play a role in the life of the treaty; this is their *raison d'être* and the purpose for which they are formulated by States and international organizations. The International Court of Justice has highlighted the importance of these statements in practice:

> "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerably probative value when they contain recognition by a party of its own obligations under an instrument."[1420]

(3) In a study on unilateral statements, Rosario Sapienza also underlined the importance of reactions to interpretative declarations, which:

> "*forniranno utile contributo anche alla soluzione. E ancor più le dichiarazioni aiuteranno l'interprete quando controversia non si dia, ma semplice problema interpretativo*" (... contribute usefully to the settlement [of a dispute]. Statements will be even more useful to the interpreter when there is no dispute, but only a problem of interpretation).[1421]

[1416] See paragraph (4) of the commentary to guideline 2.9.5.

[1417] See *Multilateral Treaties* ..., chap. XXI.6.

[1418] See paragraph (4) of the present commentary.

[1419] See in particular guidelines 4.7.1, paragraph 2, and 4.7.3.

[1420] Advisory opinion of 11 July 1950, *International Status of South-West Africa, I.C.J. Reports 1950*, pp. 135–136.

[1421] See R. Sapienza, footnote 129 above, p. 274.

(4) Notwithstanding the undeniable usefulness of reactions to interpretative declarations not only for the interpreter or judge but also in enabling the other States and international organizations concerned to determine their own position with respect to the declaration, the Vienna Convention does not require that such reactions be communicated. As has already been indicated in the commentary to guideline 2.4.1 on the form of interpretative declarations:

> "The rules governing the form and communication of reservations cannot ... be purely and simply transposed to simple interpretative declarations, which may be formulated orally, and it would thus be paradoxical to insist that they be formally communicated to the other States or international organizations concerned."[1422]

(5) There is no reason to take a different approach with respect to reactions to such interpretative declarations, and it would be inappropriate to impose more stringent formal requirements on them than on the interpretative declarations to which they respond. The same caveat applies, however: if States or international organizations do not adequately publicize their reactions to an interpretative declaration, they run the risk that the intended effects may not be produced. If the authors of such reactions want their position to be taken into account in the treaty's application, particularly when there is a dispute, it would probably be in their interest to formulate the reaction in writing in order to meet the requirements of legal security and ensure notification of the reaction. This alternative does not leave room for any intermediate solutions. Accordingly, the Commission was of the view that the word "preferably" was more appropriate than the expression "to the extent possible", used in the text of guidelines 2.1.2 (Statement of reasons for reservations), 2.6.9 (Statement of reasons for objections) and 2.9.6 (Statement of reasons for approval, opposition and recharacterization), which might convey the idea that such intermediate solutions existed.

(6) The Commission adopted guideline 2.9.5 in the form of a simple recommendation addressed to States and international organizations: it does not reflect a binding legal norm but conveys what the Commission considers to be, in most cases, the real interests of the contracting States or contracting organizations, or of any State or international organization that is entitled to become a party to a treaty in respect of which an interpretative declaration has been made.[1423] It goes without saying — as indicated by the use of the conditional ("should") — that such entities (States or international organizations) are still free simply to formulate an interpretative declaration, if that is what they prefer.

(7) Guideline 2.9.5 corresponds to guideline 2.4.1, which recommends that the authors of interpretative declarations formulate them in writing.

2.9.6 Statement of reasons for approval, opposition and recharacterization

An approval, opposition or recharacterization in respect of an interpretative declaration should, to the extent possible, indicate the reasons why it is being made.

Commentary

(1) For the same reasons that, in its view, made it preferable to formulate interpretative declarations in writing,[1424] the Commission adopted guideline 2.9.6, which recommends that States and international organizations entitled to react to an interpretative declaration state

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[1422] Para. (1) of the commentary.

[1423] Concerning the entities that may formulate an approval, opposition or recharacterization, see guideline 2.9.4.

[1424] See guideline 2.9.5 and commentary thereto.

their reasons for an approval, opposition or recharacterization. This recommendation is modelled on those adopted, for example, with respect to statements of reasons for reservations[1425] and objections to reservations.[1426]

(2) Moreover, as may be seen from the practice described above,[1427] States generally take care to explain, sometimes in great detail, the reasons for their approval, opposition or recharacterization. These reasons are useful not only for the interpreter: they can also alert the State or the international organization that submitted the interpretative declaration to the points found to be problematic in the declaration and, potentially, induce the author to revise or withdraw the declaration. This constitutes, with respect to interpretative declarations, the equivalent of the "reservations dialogue".

(3) The Commission wondered, however, whether the recommendation to provide a statement of reasons ought to be extended to cover the approval of an interpretative declaration. Besides the fact that practice in the matter is extremely rare,[1428] it may be assumed that approvals are formulated for the same reasons that prompted the declaration itself and generally even use the same wording.[1429] Although some members considered that stating the reasons for an approval might cause confusion (if, for example, reasons were given for the interpretative declaration itself and the two reasons differed), the majority of the Commission considered that there should be no distinction in that regard between the various categories of reaction to interpretative declarations, particularly in the present case, since guideline 2.9.6 is a simple recommendation that has no binding force for the author of the approval.

(4) The same applies to opposition or recharacterization. In all cases, incidentally, an explanation of the reasons for a reaction may be a useful element in the dialogue among the contracting States or contracting organizations and entities entitled to become parties.

2.9.7 Formulation and communication of approval, opposition or recharacterization

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to an approval, opposition or recharacterization in respect of an interpretative declaration.

Commentary

(1) The formulation in writing of a reaction to an interpretative declaration, whether approval, opposition or recharacterization,[1430] makes it easier to disseminate it to the other entities concerned, contracting States or contracting organizations entitled to become parties.

(2) Although there is no legal requirement to disseminate a reaction, the Commission strongly believes that it is in the interests of both the authors of a reaction to a unilateral declaration and all the entities concerned to do so and that the formulation and communication of a reaction could follow the procedure for other types of declarations relating to a treaty,

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[1425] See guideline 2.1.2 and commentary thereto.

[1426] See guideline 2.6.9 and commentary thereto.

[1427] See paragraphs (1) to (9) of the commentary to guideline 2.9.2 and paragraph (4) of the commentary to guideline 2.9.3.

[1428] See the commentary to guideline 2.9.1 above.

[1429] It is primarily for this reason that the Commission did not consider it useful to include in the Guide to Practice a recommendation that reasons should be given for interpretative declarations themselves (see paragraph (10) of the commentary to guideline 2.4.4).

[1430] See guideline 2.9.5.

which is actually very similar – namely, guidelines 2.1.3 to 2.1.7 in the case of reservations, 2.4.1 and 2.4.7 in the case of interpretative declarations and 2.6.8 and 2.8.5, in the case of, respectively, objections to reservations and their express acceptance. Given that all these guidelines are modelled on those relating to reservations, it seemed sufficient to refer the user to the rules on reservations, *mutatis mutandis*.

(3) Unlike the effect produced by the formulation of reservations, however, these rules on the formulation and communication of reactions to interpretative declarations are of an optional nature only, and guideline 2.9.7 is simply a recommendation, as the use of the conditional ("should") indicates.

(4) The Commission wondered whether reference should be made in guideline 2.9.7 to guideline 2.1.7 concerning the functions of depositaries. It was decided that, since the provision is based on the idea that "the depositary shall examine whether a reservation to a treaty ... is in due and proper form" and that interpretative declarations do not have to take any particular form, such a reference was unnecessary. Since there may be cases, however, in which an interpretative declaration is not permissible (where the treaty precludes such a declaration),[1431] it was deemed necessary to include the formulation of guideline 2.1.7, which sets out the course to take in the event of a divergence of views in cases of this kind.

2.9.8 Non-presumption of approval or opposition

1. An approval of, or an opposition to, an interpretative declaration shall not be presumed.

2. Notwithstanding guidelines 2.9.1 and 2.9.2, an approval of an interpretative declaration or an opposition thereto may be inferred, in exceptional cases, from the conduct of the States or international organizations concerned, taking into account all relevant circumstances.

Commentary

(1) Guideline 2.9.8 establishes a general framework and should be read in conjunction with guideline 2.9.9, which relates more specifically to the role that may be played by the silence of a State or an international organization with regard to an interpretative declaration.

(2) As is clear from the definitions of an approval of and an opposition to an interpretative declaration contained in guidelines 2.9.1 and 2.9.2, both essentially take the form of a unilateral declaration made by a State or an international organization whereby the author expresses agreement or disagreement with the interpretation formulated in the interpretative declaration.

(3) In the case of reservations, silence, according to the presumption provided for in article 20, paragraph 5, of the Vienna Conventions, means consent. The International Court of Justice, in its 1951 advisory opinion, noted the "very great allowance made for tacit assent to reservations",[1432] and the work of the Commission has from the outset acknowledged the considerable part played by tacit acceptance.[1433] Sir Humphrey Waldock justified the principle of tacit acceptance by pointing out that:

[1431] See guideline 3.5 (Permissibility of interpretative declarations).

[1432] *I.C.J. Reports 1951*, footnote 604 above, p. 21.

[1433] See D. Müller, Commentaire de l'article 20 (1969), (footnote 1087 above), pp. 814–815, paras. 31 and 32; and 1969 Vienna Convention Article 20, footnote 1087 above, pp. 499–500, paras. 29–30.

> "It is (...) true that, under the 'flexible' system now proposed, the acceptance or rejection by a particular State of a reservation made by another primarily concerns their relations with each other, so that there may not be the same urgency to determine the status of a reservation as under the system of unanimous consent. Nevertheless, it seems very undesirable that a State, by refraining from making any comment upon a reservation, should be enabled more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving State."[1434]

(4) In the case of simple interpretative declarations (as opposed to conditional interpretative declarations[1435]), there is no rule comparable to that contained in article 20, paragraph 5, of the Vienna Conventions (the principle of which is reflected in guideline 2.8.2), so these concerns do not arise. By definition, an interpretative declaration purports only to "specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions", but it in no way imposes conditions on its author's consent to be bound by the treaty.[1436] Whether or not other States or international organizations consent to the interpretation put forward in the declaration has no effect on the author's legal status with respect to the treaty; the author becomes or remains a contracting party regardless. Continued silence on the part of the other parties has no effect on the status as a party of the State or organization that formulates an interpretative declaration: such silence cannot prevent the latter from becoming or remaining a party, in contrast to what could occur in the case of reservations under article 20, paragraph 4 (c), of the Vienna Conventions were it not for the presumption provided for in paragraph 5 of that article.

(5) Thus, since one cannot proceed by analogy with reservations, the issue of whether, in the absence of an express reaction, there is a presumption of approval of or opposition to interpretative declarations remains unresolved. In truth, however, this question can only be answered in the negative. In fact, it is inconceivable that silence could in itself produce such a legal effect.

(6) Moreover, this appears to be the position most widely supported in the literature. Frank Horn states that:

> "Interpretative declarations must be treated as unilaterally advanced interpretations and should therefore be governed only by the principles of interpretation. The general rule is that a unilateral interpretation cannot be opposed to any other party in the treaty. Inaction on behalf of the confronted states does not result in automatic construction of acceptance. It will only be one of many cumulative factors which together may evidence acquiescence. The institution of estoppel may become relevant, though this requires more explicit proof of the readiness of the confronted states to accept the interpretation."[1437]

(7) Although inaction cannot in itself be construed as either approval or opposition — neither of which can be presumed in any way (this is stated more specifically in guideline 2.9.9 on the silence of a State or an international organization with respect to an interpretative declaration) — the position taken by Horn also suggests that silence can, under certain conditions, be taken to signify acquiescence in accordance with the principles of good faith

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[1434] First report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 67, para. 15.

[1435] See guideline 1.4.

[1436] The situation is evidently different with respect to conditional interpretative declarations. See *ibid.*

[1437] F. Horn, footnote 25 above, p. 244 (footnotes omitted); see also D.M. McRae, footnote 129 above, p. 168.

and, more particularly in the context of treaty interpretation, through the operation of article 31, paragraph 3 (b), of the Vienna Conventions, which provides for the consideration, in interpreting a treaty, of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". Further, the concept of acquiescence itself is not unknown in treaty law: article 45 of the 1969 Vienna Convention provides that:

> "A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:
>
> (*a*) […]
>
> (*b*) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."

Article 45 of the 1986 Vienna Convention reproduces this provision, adapting it to the specific case of international organizations.

(8) However, this provision does not define the "conduct" in question, and it would seem extremely difficult, if not impossible, to determine in advance the circumstances in which a State or an organization is bound to protest expressly in order to avoid being considered as having acquiesced to an interpretative declaration or to a practice that has been established on the basis of such a declaration.[1438] In other words, it is particularly difficult to determine when and in what specific circumstances inaction with respect to an interpretative declaration is tantamount to consent. As the Eritrea-Ethiopia Boundary Commission stressed:

> "The nature and extent of the conduct effective to produce a variation of the treaty is, of course, a matter of appreciation by the tribunal in each case. The decision of the International Court of Justice in the *Temple* case is generally pertinent in this connection. There, after identifying conduct by one party which it was reasonable to expect that the other party would expressly have rejected if it had disagreed with it, the Court concluded that the latter was stopped or precluded from challenging the validity and effect of the conduct of the first. This process has been variously described by such terms, amongst others, as estoppel, preclusion, acquiescence or implied or tacit agreement. But in each case the ingredients are the same: an act, course of conduct or omission by or under the authority of one party indicative of its view of the content of the applicable legal rule – whether of treaty or customary origin; the knowledge, actual or reasonably to be inferred, of the other party, of such conduct or omission; and a failure by the latter party within a reasonable time to reject, or dissociate itself from, the position taken by the first."[1439]

(9) It therefore seems impossible to provide, in the abstract, clear guidelines for determining when a silent State has, by its inaction, created an effect of acquiescence or estoppel. This can only be determined on a case-by-case basis in the light of the circumstances in question.

(10) For this reason, paragraph 1 of guideline 2.9.8, which complements guidelines 2.9.1 and 2.9.2, unequivocally states that the presumption provided for in article 20, paragraph 5, of

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[1438] See in particular C. Rousseau, footnote 351 above, p. 430, No. 347.

[1439] Decision regarding delimitation of the border between Eritrea and Ethiopia, 13 April 2002, Permanent Court of Arbitration, *UNRIAA*, vol. XXV, p. 111, para. 3.9; see also the well-known separate opinion of Judge Alfaro in the *Temple of Preah Vihear (Cambodia v. Thailand)* case, *I.C.J. Reports 1962*, p. 40.

the Vienna Conventions is not applicable. Paragraph 2, however, acknowledges that, as an exception to the principle arising from these two guidelines, the conduct of the States or international organizations concerned may be considered, depending on the circumstances, as constituting approval of, or opposition to, the interpretative declaration.

(11) Given the wide range of "relevant circumstances" (a cursory sample of which is given in the preceding paragraphs), the Commission did not think it possible to describe them in greater detail.

2.9.9 Silence with respect to an interpretative declaration

An approval of an interpretative declaration shall not be inferred from the mere silence of a State or an international organization.

Commentary

(1) The practice (or, more accurately, the absence of practice) described in the commentary to guidelines 2.9.2 and, in particular, 2.9.1 shows the considerable role that States allow silence to play in the context of interpretative declarations. Express positive — and even negative — reactions are extremely rare. One wonders therefore whether it is possible to infer from such overwhelming silence consent to the interpretation proposed by the State or international organization making the interpretative declaration.

(2) As was noted in a study on silence in response to a violation of a rule of international law, which is fully applicable here: "*le silence en tant que tel ne dit rien puisqu'il est capable de 'dire' trop de choses à la fois*" (silence in itself says nothing because it is capable of "saying" too many things at once).[1440] Silence can express either agreement or disagreement with the proposed interpretation. States may consider it unnecessary to respond to an interpretative declaration because they share the view expressed therein, or they may feel that the interpretation is erroneous but that there is no point in saying so since, in any event, the interpretation would not, in their view, be upheld by an impartial third party in case of a dispute. It is impossible to determine which of these two hypotheses is correct.[1441]

(3) Guideline 2.9.9 expresses this idea by applying the general principle established in guideline 2.9.8, paragraph 1, specifically to silence.

(4) Although silence is not in principle equivalent to approval of or acquiescence to an interpretative declaration, it is conceivable that, in some circumstances, the silent State is nonetheless considered as having acquiesced to the declaration by reason of its conduct, or lack of conduct in circumstances where conduct is required, in relation to the interpretative

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[1440] G. Buzzini, "*Abstention, silence et droit international général*", *Rivista di Diritto internazionale*, 2005/2, p. 382.

[1441] See in this connection, Heinrich Drost, "Grundfragen der Lehre vom internationalen Rechtsgeschäft", in D.S. Constantopoulos and Hans Wehberg (eds.), *Gegenwartsprobleme des internationalen Rechts und der Rechtsphilosophie, Festschrift für Rudolf Laun zu seinem siebzigsten Geburtstag* (Hamburg, Girardet, 1953), p. 218: "*Wann Schweigen als eine Anerkennung angesehen werden kann, ist Tatfrage. Diese ist nur dann zu bejahen, wenn nach der Sachlage — etwa nach vorhergegangener Notifikation — Schweigen nicht nur als ein objektiver Umstand, sondern als schlüssiger Ausdruck des dahinterstehenden Willens aufgefaßt werden kann*" (The question as to when silence can be construed as acceptance is a question of circumstances. The answer cannot be affirmative unless, given the factual circumstances — following prior notification, for example — silence cannot be understood simply as an objective situation, but as a conclusive expression of the underlying will).

declaration. This is an inverse derogation from the general principle, the existence of which must not be affirmed lightly and is by no means automatic. Silence must therefore be viewed as merely one aspect of the general conduct of the State or international organization in question.

3. Permissibility of reservations and interpretative declarations

General commentary

(1) The purpose of Part 3, which comes after Part 1 devoted to definitions and Part 2 dealing with the procedure for formulating reservations and interpretative declarations, is to determine the conditions for the permissibility of reservations to treaties (and of interpretative declarations).

(2) After extensive debate, the Commission decided to retain the term "validity of reservations" to describe the intellectual operation consisting in determining whether a unilateral statement made[1442] by a State or an international organization and purporting to exclude or modify the legal effect of certain provisions of the treaty[1443] in their application to that State or organization was capable of producing the effects attached in principle to the formulation of a reservation.

(3) Adhering to the definition found in article 2, paragraph 1 (d), of the Vienna Conventions, reproduced in guideline 1.1, the Commission accepted that all unilateral statements meeting that definition constituted reservations. But, as the Commission states very clearly in its commentary to guideline 1.8, "[d]efining is not the same as regulating. […] [a] reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established".[1444] It goes on to say: "Furthermore, the exact determination of the nature of a statement is a precondition for the application of a particular legal regime and, above all, for the assessment of its validity. It is only once a particular instrument has been defined as a reservation (...) that one can decide whether it is valid, evaluate its legal scope and determine its effect."[1445]

(4) At an early stage, the Commission opted for in French the words "*licéité*" and "*illicéité*" in preference to "*validité*" ("validity") and "*invalidité*" ("invalidity") in order to respond to the concerns expressed by some members of the Commission and some States who considered that the term "validity" cast doubt on the nature of statements that fit the definition of reservations given in article 2, paragraph 1 (d), of the Vienna Conventions but did not fulfil the conditions set forth in article 19.[1446] Actually, the word "validity" is quite neutral in that regard. It would have had the advantage of not leading to mistaken conclusions as to the position of the Commission with regard to the doctrinal controversy,[1447] central to the

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[1442] Since the mere formulation of a reservation does not allow it to produce the effects intended by its author, the word "formulated" would have been more appropriate (see below the commentary to guideline 3.1, paras. (6) and (7)); but the Vienna Conventions use the word "made" and as a matter of principle the Commission does not wish to revisit the Vienna text.

[1443] Or of the treaty as a whole with respect to certain specific aspects (see paragaraph 2 of guideline 1.1.1).

[1444] Paragraph (1) of the commentary.

[1445] Paragraph (2) of the commentary. See also paragraph (16) of the commentary to guideline 1.1.

[1446] See the statement of the United Kingdom in the Sixth Committee on 2 November 1993, A/C.6/48/SR.24, para. 42.

[1447] On this doctrinal dispute, see in particular Jean Kyongun Koh, "Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision", *Harvard International Law* question of reservations, between the proponents of "permissibility", who hold that "the issue of 'permissibility' is the preliminary issue. It must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether as a matter of policy, other Parties find the reservations acceptable or not",[1448] and the proponents of "opposability", who hold that "the validity of a reservation depends solely on the acceptance of the reservation by another contracting State" and who therefore view article 19, subparagraph (c), of the Vienna Convention of 1969 "as a mere doctrinal assertion, which may serve as a basis for guidance to States regarding acceptance of reservations, but not more than that".[1449]

(5) Moreover, it was thought that the French term "*illicite*" was not appropriate in any case to characterize reservations that did not fulfil the conditions of form or substance set by the Vienna Conventions. The Commission considers in this regard that in international law, an internationally wrongful act entails its author's responsibility, and this is plainly not the case with regard to the formulation of reservations that are contrary to the provisions of the treaty to which they relate or incompatible with its object and purpose.[1450]

(6) It thus appeared to the Commission:

- First, that the term "*licite*" implied that the formulation of reservations contrary to the provisions of article 19 of the Vienna Conventions would engage the responsibility of the reserving State or international organization, which was certainly not the case.[1451] That is in fact why the Commission, which had at first used the term "*illicite*" as an equivalent to the English word "impermissible" to describe reservations formulated notwithstanding the provisions of article 19, decided at its fifty-eighth session, to replace the words "*licite*", "*illicite*", "*licéité*" and "*illicéité*" with "*valide*", "*non-valide*", "*validité*" and "*non-validité*" and to modify the commentary to all the guidelines of the Guide to Practice accordingly.[1452]
- Second, that the term "permissible" used in the English text of the guidelines and the commentaries thereto might imply that the issue is exclusively one of permissibility and not of opposability, which has the disadvantage of unnecessarily taking a position in the doctrinal controversy discussed above.[1453]

(7) However, the term "permissibility" was retained to denote the substantive validity of reservations that fulfilled the requirements of article 19 of the Vienna Conventions, since, according to the English speakers, the term did not imply taking a position as to the consequences of non-fulfilment of those conditions. The term was rendered in French by the term "*validité substantielle*".

(8) Part 3 of the Guide to Practice deals successively with the questions relating to:

Journal, vol. 23 (1982), pp. 71–116, *passim*, in particular pp. 75–77; see also C. Redgwell, footnote 1131 above, pp. 243–282, in particular pp. 263–269; and I. Sinclair, footnote 125 above, p. 81, footnote 78.

[1448] D.W. Bowett, footnote 150 above, p. 88.

[1449] J.M. Ruda, footnote 56 above, p. 190.

[1450] See above guideline 3.3.2 (Non-permissibility of reservations and international responsibility) and commentary.

[1451] See above, paragraph (5).

[1452] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 324–327, para. 159. See also paragraphs (2) to (7) of the general commentary to Part 3 of the Guide to Practice.

[1453] See above, paragraph (4).

- Permissibility of reservations;
- Competence to assess the permissibility of reservations; and
- Consequences of the impermissibility of a reservation;
- Permissibility of reactions to reservations.

An additional section is devoted to the same questions in relation to interpretative declarations.

3.1 Permissible reservations

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Commentary

(1) Guideline 3.1 faithfully reproduces the wording of article 19 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, which is patterned after the corresponding provision of the 1969 Convention with just two additions, which were needed in order to cover treaties concluded by international organizations.[1454]

(2) By providing that, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, "[a] State or an international organization may (...) formulate a reservation", albeit under certain conditions, that provision sets out "the general principle that the formulation of reservations is permitted ...".[1455] This is an essential element of the "flexible system" stemming from the advisory opinion of the International Court of Justice of 1951,[1456] and it is no exaggeration to say that, on this point, it reverses the traditional

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[1454] On the *travaux prèparatoires* of article 19 of the 1986 Vienna Convention, see Alain Pellet, "Article 19 (1986)" in O. Corten and P. Klein (eds.), *Les Conventions de Vienne sur le droit des traités* ..., footnote 30 above, pp. 189–796; and Alain Pellet, 1986 Vienna Convention Article 19, in Olivier Corten et Pierre Klein (eds.), *The Vienna Conventions on the Law of Treaties* ..., vol. I, footnote 30 above, pp. 483-488.

[1455] Commentary to draft article 18 adopted on first reading in 1962, *Yearbook ... 1962*, vol. II, p. 180, para. (15); see also the commentary to draft article 16 adopted on second reading, *Yearbook ... 1966*, vol. II, p. 207, para. (17). For the 1986 Convention, see the commentary to draft articles 19 (Formulation of reservations in the case of treaties between several international organizations) adopted in 1977, *Yearbook ... 1977*, vol. II (Part Two), p. 106, para. (1), and 19 *bis* (Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States), *Yearbook ... 1977*, vol. II (Part Two), p. 108, para. (3).

[1456] *I.C.J. Reports 1951*, footnote 604 above, p. 15.

presumption resulting from the system of unanimity,[1457] the stated aim being to facilitate the widest possible participation in treaties and, ultimately, their universality.

(3) In this regard, the text of article 19 finally adopted in 1969 resulted directly from Waldock's proposals and takes the opposite view from the drafts prepared by the Special Rapporteurs on the law of treaties who preceded him, all of whom started from the inverse assumption, expressing in negative or restrictive terms the principle that a reservation might only be formulated (or "made")[1458] if certain conditions were met.[1459] Waldock,[1460] on the other hand, presents the principle as the "power to formulate, that is, to *propose*, a reservation", which a State has "in virtue of its sovereignty".[1461]

(4) However, this right is not unlimited:

- In the first place, it is limited in time, since a reservation may only be formulated "when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty";[1462]
- In the second place, the formulation of reservations may be incompatible with the object of some treaties, either because they are limited to a small group of States — a situation that is taken into account in article 20, paragraph 2, of the Convention, which reverts to the system of unanimity where such instruments are concerned[1463] — or, in the case of instruments [illegible] universal scope, because the parties intend to make the integrity of the treaty takes precedence over its universality or, at any rate, to limit the right of States to formulate reservations; on this issue, as on all others, the Vienna Convention is only intended to be residual in nature, and there is nothing to prevent the negotiators from inserting in the treaty "reservations clauses" that limit or modify the right set out as a principle in article 19.[1464]

[1457] This concept, which had undoubtedly become the customary norm in the period between the wars (see the joint dissenting opinion of Judges Guerrero, McNair, Read and Hsu Mo, appended to the advisory opinion, *I.C.J. Reports 1951*, pp. 34–35), significantly restricted the right to make reservations: this was possible only if all the other parties to the treaty accepted the reservation, otherwise the author remained outside the treaty. In its comments on the draft article 18 adopted by the Commission in 1962, Japan proposed reverting to the opposite presumption (see the fourth report of Sir Humphrey Waldock on the law of treaties (A/CN.4/177 and Adds.1 and 2), *Yearbook ... 1965*, vol. II, p. 46).

[1458] On this point, see paragraphs (6) and (7) below.

[1459] See, for example, draft article 10, para. 1, proposed by J.L. Brierly (A/CN.4/23, *Yearbook ... 1950*, vol. II, p. 238), the drafts of article 9 proposed by Hersch Lauterpacht (first report (A/CN.4/63), *Yearbook ... 1953*, vol. II, pp. 91–92; and second report (A/CN.4/87), *Yearbook ... 1954*, vol. II, p. 131); or draft article 39, para. 1, proposed by G.G. Fitzmaurice (*Yearbook ... 1956*, vol. II, p. 115). See the comments of P.-H. Imbert, footnote 25 above, pp. 88–89.

[1460] "A State is free, when signing, ratifying, acceding to or accepting a treaty, to formulate a reservation ... unless: ..." (first report (A/CN.4/144), *Yearbook ... 1962*, vol. II, article 17, para. 1 (a), p. 60).

[1461] Commentary to article 17, *ibid.*, p. 65, para. (9) - emphasis in the original.

[1462] See paragraph (9) below.

[1463] "When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties."

[1464] With regard to the residual nature of the Vienna regime, see A. Aust, footnote 155 above, pp. 151–153; John King Gamble, Jr., "Reservations to Multilateral Treaties: A Macroscopic View of State practice", *AJIL*, vol. 74 (1980), pp. 383–391; P.-H. Imbert, footnote 25 above, pp. 162–230; McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1961), pp. 169–173;

(5) Although the view has sometimes been expressed that it was excessive to speak of a "right to reservations", even though the Convention proceeds from the principle that there is a presumption in favour of their permissibility. This, moreover, is the significance of the very title of article 19 of the Vienna Conventions ("Formulation of reservations"),[1465] which is confirmed by its *chapeau*: "A State may (...) formulate a reservation unless ...". It should, however, be noted that by using the verb "may", the introductory clause of article 19 recognizes that States have a right, but it is only the right to "formulate" reservations.[1466]

(6) The words "formulate" and "formulation" were carefully chosen. They indicate that a "formulated" reservation is not "made", in the sense that a reservation does not produce its effects simply by virtue of its formulation. For that reason an amendment seeking to replace the words "formulate a reservation" with the words "make reservations"[1467] was rejected by the Drafting Committee of the Vienna Conference.[1468] As Waldock noted, "there is an inherent ambiguity in saying (...) that a State may '*make*' a reservation: for the very question at issue is whether a reservation *formulated* by one State can be held to have been effectively 'made' unless and until it has been assented to by the other interested States".[1469] Now, not only is a reservation only "established"[1470] if certain procedural conditions — admittedly, not very restrictive ones[1471] — are met, but it must also comply with the substantive conditions

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J. Polakiewicz, footnote 638 above, pp. 85–90 and 101–104; R. Riquelme Cortado, footnote 150 above, pp. 89–136.

[1465] Concerning the modification of this title in the context of the Guide to Practice, see paragraph (10) below.

[1466] P.-H. Imbert, footnote 25 above, p. 83; see also P. Reuter, footnote 28 above, p. 75; or R. Riquelme Cortado, footnote 150 above, p. 84. It may also be noted that a proposal by Briggs to replace the word "free" in Waldock's draft (see footnote 1460 above) with the words "legally entitled" (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 140, para. 22) was not accepted, nor was an amendment along the same lines proposed by the Union of Soviet Socialist Republics at the Vienna Conference (A/CONF.39/C.1/L.115, in *Documents of the Conference*, A/CONF.39/11/Add.2, footnote 54 above, p. 133, para. 175). The current wording ("A State may ... formulate a reservation unless ...") was adopted by the Commission's Drafting Committee (*Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 221, para. 3), then by the Commission in plenary meeting in 1962 (*ibid.*, vol. II, pp. 175–176, article 18, para. 1). No amendments were made in 1966, other than the replacement of the words "*Tout État*" [in the French text] with the words "*Un État*" (see *Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, p. 287, para. 1 (text adopted by the Drafting Committee), and *Yearbook ... 1966*, vol. II, p. 202 (article 16 adopted on second reading)).

[1467] A/CONF.39/C.1/L.161 (see *Documents of the Conference* A/CONF.39/11/Add.2, footnote 54 above, p. 145, para. 177).

[1468] See *First Session, Summary records*, footnote 35 above, Committee of the Whole, 23rd meeting, 11 April 1968, p. 121, para. 2, and 24th meeting, 16 April 1968, p. 126, para. 13 (statement by the Expert Consultant, Sir Humphrey Waldock).

[1469] First report (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 62, para. (1) of the commentary to draft articles 17, 18 and 19.

[1470] See the *chapeau* of article 21, "A reservation established with regard to another party in accordance with articles 19, 20 and 23 ...", and guidelines 4.1 to 4.1.3.

[1471] See article 20, paras. 3–5, article 21, para. 1, and article 23 and guidelines 2.1 to 2.2.4. See also M. Coccia, footnote 196 above, p. 28; D. Müller, Commentaire des articles 20 et 21 (1969) footnotes 1087 and 49 above, pp. 797–875 and pp. 883–929; and D. Müller, 1969 Vienna Convention Article 20 and Article 21, footnotes 1087 and 49 above, vol. I, pp. 489–534 and pp. 538–564.

set forth in the three subparagraphs of article 19 itself, as the word "unless" clearly demonstrates.[1472]

(7) According to some authors, the terminology used in this provision is not consistent in that regard, since "*[l]orsque le traité autorise certaines réserves (article 19, alinéa b), elles n'ont pas besoin d'être acceptées par les autres États (...). Elles son donc 'faites' dès l'instant de leur formulation par l'État réservataire*" ["if the treaty permits specified reservations (article 19, subparagraph (b)), they do not need to be accepted by the other States … They are thus 'made' from the moment of their formulation by the reserving State"].[1473] According to that logic, while subparagraph (b) correctly states that such reservations "may be *made*", the *chapeau* of article 19 could be misleading by implying that they, too, are merely "formulated" by their author.[1474] But this is an empty argument:[1475] subparagraph (b) is not about reservations that are established (or made) simply by virtue of being formulated, but rather about reservations that are not permitted by the treaty. As in the situation in subparagraph (a), such reservations may not be formulated: in one case (subparagraph (a)), the prohibition is explicit; in the other (subparagraph (b)), it is implied.

(8) Moreover, the principle of the right to formulate reservations cannot be separated from the exceptions to the principle. For this reason, the Commission, which in general has avoided modifying the wording of the provisions of the Vienna Conventions that it has carried over into the Guide to Practice, decided against devoting a separate guideline to the principle of the presumption of the validity of reservations.

(9) For the same reason, the Commission chose not to leave out of guideline 3.1 a reference to all the different moments "in which a reservation may be formulated". As discussed above,[1476] article 19 reproduces the temporal limitations included in the definition of reservations in article 2, paragraph 1 (d), of the Vienna Conventions,[1477] and this repetition is no doubt superfluous, as was stressed by Denmark during the consideration of the draft articles on the law of treaties adopted in 1962.[1478] However, the Commission did not think it necessary to correct the anomaly when the final draft was adopted in 1966, and the repetition is not sufficiently inconvenient to merit rewriting the Vienna Convention, which allowed this drawback to remain.

(10) The repetition also provides a discreet reminder that the validity of reservations does not depend solely on the substantive conditions set forth in article 19 of the Vienna

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[1472] "This article states the general principle that the *formulation* of reservations is permitted except in three cases" (*Yearbook … 1966*, vol. II, p. 207, commentary to art. 16, para. (17)) – emphasis added; the use of the word "*faire*" in the French text of the commentary (*ibid.*, p. 225) is open to criticism, but it is probably a translation error, rather than a deliberate choice – *contra*: P.-H. Imbert, footnote 25 above, p. 90. In any case, the English text of the commentary is correct.

[1473] P.-H. Imbert, footnote 25 above, pp. 84–85.

[1474] See also J.M. Ruda, footnote 56 above, pp. 179–180, and the far more restrained criticism by F. Horn, footnote 25 above, pp. 111–112.

[1475] One may, however, question the use of the verbs "formulate" and "make" in article 23, para. 2; it is not consistent to state, at the end of this provision, that, if a reservation formulated when signing [a treaty] is confirmed at the time of the expression of consent to be bound, "the reservation shall be considered as having been made on the date of its confirmation". In elaborating the Guide to Practice on reservations, the Commission has endeavoured to adopt consistent vocabulary in this regard (the criticisms directed at it by R. Riquelme Cortado, footnote 150 above, p. 85, appear to be based on a translation error in the Spanish text).

[1476] Para. (4).

[1477] See guidelines 1.1 (Definition of reservations) and commentary.

[1478] See the fourth report of Humphrey Waldock (A/CN.4/177), *Yearbook … 1965*, vol. II, p. 46.

Conventions but is also dependent on conformity with conditions of form and timeliness. However, those formal conditions are dealt with in Part 2 of the Guide to Practice, so that Part 3 deals with the substantive validity, that is, the permissibility of reservations – hence the title of "Permissible reservations" chosen by the Commission for guideline 3.1, for which it was not possible to retain the title of article 19 of the Vienna Conventions ("Formulation of reservations"), since it was already used for guideline 2.1.3[1479] and would, in any case, tend to put the accent, inappropriately, on the formal conditions for the validity of reservations.

3.1.1 Reservations prohibited by the treaty

A reservation is prohibited by the treaty if it contains a provision:

(a) prohibiting all reservations;

(b) prohibiting reservations to specified provisions to which the reservation in question relates; or

(c) prohibiting certain categories of reservations including the reservation in question.

Commentary

(1) According to Reuter, the situations envisaged in subparagraphs (a) and (b) of article 19 (reproduced in guideline 3.1) constitute very simple cases.[1480] However, that is not at all certain. It is true that these provisions refer to cases where the treaty to which a State or an international organization wishes to make a reservation contains a special clause prohibiting or permitting the formulation of reservations. But, aside from the fact that not all possibilities are explicitly covered,[1481] delicate problems can arise regarding the exact scope of a clause prohibiting reservations and the effects of a reservation formulated despite that prohibition.

(2) Guideline 3.1.1 is intended to clarify the scope of subparagraph (a) of guideline 3.1, which does not spell out what is meant by "reservation … prohibited by the treaty", while guidelines 3.1.2 and 3.1.4 undertake to clarify the meaning and the scope of the expression "specified reservations" contained in subparagraph (b).

(3) In draft article 17, paragraph 1 (a), which he submitted to the Commission in 1962, Waldock distinguished three situations:

- Reservations "prohibited by the terms of the treaty, or excluded by the nature of the treaty or by the established usage of an international organization";
- Reservations not provided for by a clause that restricts the reservations that can be made; or
- Reservations not provided for by a clause that authorizes certain reservations.[1482]

What these three cases had in common was that, unlike reservations incompatible with the object and purpose of the treaty,[1483] "when a reservation is formulated that is not prohibited by the treaty, the other States are called upon to indicate whether they accept or reject it but, when the reservation is one prohibited by the treaty, they have no need to do so, for they have already expressed their objection to it in the treaty itself".[1484]

[1479] "Representation for the purpose of formulating a reservation at the international level".

[1480] P. Reuter, footnote 405 above, p. 625. For the contrary view on the complexity of the issue, see A. Pellet, "Article 19 (1969)", footnote 1454 above, pp. 715–725, paras. 151–167; A. Pellet, 1969 Vienna Convention Article 19, footnote 1454 above, pp. 433–441, paras. 75–91.

[1481] See footnote 1483 and the commentary to guideline 3.1.3, para. (9), below.

[1482] First report (A/CN.4/144), *Yearbook … 1962*, vol. II, pp. 60–61.

[1483] Situation envisaged in para. 2 of draft article 17 but in a rather different form than in the current text.

(4) Even though it was taken up again, in a slightly different form, by the Commission,[1485] this categorization was unnecessarily complicated and, at the rather general level at which the authors of the Convention intended to operate, there was no point in drawing a distinction between the first two situations identified by the Special Rapporteur.[1486] In the draft article 18, paragraph 2, which he proposed in 1965 in the light of the observations by Governments, he limited himself to distinguishing reservations prohibited by the terms of the treaty (or "by the established rules of an international organization")[1487] from those implicitly prohibited as a result of the authorization of specified reservations by the treaty.[1488] This distinction is found in a more refined form[1489] in article 19, subparagraphs (a) and (b), of the Convention,

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[1484] First report (A/CN.4/144), *Yearbook .. 1962*, vol. II, p. 65, para. (9) of the commentary.

[1485] Draft article 18, para. 1 (b), (c) and (d), report of the International Law Commission (1962) (A/5209), *Yearbook ... 1962*, vol. II, p. 176 (see the commentary to this para., p. 180, para. (15)).

[1486] On the contrary, during the debate on the draft, Briggs considered that "the distinction was between the case set out in subparagraph (a), where all reservations were prohibited, and the case set out in subparagraphs (b) and (c), where only some reservations were either expressly prohibited or impliedly excluded" (*Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 222, para. 12); *contra*: Waldock, *ibid.*, p. 223, para. 32; as the example of article 12 of the 1958 Convention on the Limits of the Continental Shelf (see the commentary to guideline 3.1.2, para. (6) below) indicates, this comment is highly relevant.

[1487] Although the principle had not been disputed at the time of the debate in the plenary Commission in 1965 (but had been disputed by Lachs in 1962 (see *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 142, para. 53) and had been retained in the text adopted during the first part of the seventeenth session (see *Yearbook ... 1965*, vol. II, p. 162) this indication disappeared without explanation from draft article 16 as finally adopted by the Commission in 1966 following the "final cleanup" by the Drafting Committee (see *Yearbook ... 1966*, vol. I (Part Two), 887th meeting, 11 July 1966, p. 295, para. 91). The deletion of this phrase should be seen in the context of the general safeguards clause concerning constituent instruments of international organizations or treaties adopted within an international organization appearing in article 5 of the Convention and adopted the same day in its final form by the Commission (*ibid.*, p. 294, para. 79). In practice, it is very unusual to allow reservations to be formulated to the constituent instruments of an international organization (see M.H. Mendelson, footnote 1338 above, pp. 137–71). As for treaties concluded within the context of international organizations, the best example of (purported) exclusion of reservations is that of the International Labour Organization, whose consistent practice is not to accept the deposit of instruments of ratification of international labour conventions when accompanied by reservations (see the Memorandum submitted by the Director of the International Labour Office to the Council of the League of Nations on the admissibility of reservations to general conventions, *Official Journal* of the League of Nations, 1927, p. 882, or the memorandum submitted by the International Labour Organization to the International Court of Justice in 1951 in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, (footnote 604 above) in *I.C.J. Reports 1951, Pleadings, Oral Arguments and Documents*, pp. 227–228, or the statement of Wilfred Jenks, Legal Adviser of the International Labour Organization, during the oral pleadings in that case, *ibid.*, p. 234); for a discussion and critique of this position, see the commentary to guideline 1.1.6 (Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of a treaty), paras. (3)–(5).

[1488] Fourth report (A/CN.4/177), *Yearbook ... 1965*, vol. II, p. 50.

[1489] On the editorial changes made by the Commission, see the debate on draft article 18 (*Yearbook ... 1965*, vol. I, especially the 797th and 798th meetings, 7 and 9 June 1965, pp. 147–163) and the text adopted by the Drafting Committee (*ibid.*, 813th meeting, 29 June 1965, p. 263–264, para. 1) and the debate on it (*ibid.*, pp. 264–265). The final texts of art. 16 (a) and (b) adopted on second reading by the Commission read as follows: "A State may ... formulate a reservation without any distinction being made as to whether the treaty prohibits, or fully or partially authorizes reservations.[1490]

(5) According to Tomuschat, the prohibition in subparagraph (a), as it is worded, should be understood as covering both express prohibitions and implicit prohibitions of reservations.[1491] Some justification for this interpretation can be found in the *travaux préparatoires* of this provision:

- In the original wording, proposed by Waldock in 1962,[1492] it was specified that the provision concerned reservations that were "prohibited by the terms of the treaty", a clarification that was abandoned in 1965 without explanation by the Special Rapporteur and with little light being shed by the discussions in the Commission on this matter;[1493]
- In the commentary to draft article 16 adopted on second reading in 1965, the Commission in effect seems to place on the same footing "reservations expressly or implicitly prohibited by the provisions of the treaty".[1494]

(6) This interpretation, however, is open to question. The idea that certain treaties could "by their nature", exclude reservations was discarded by the Commission in 1962, when it rejected the proposal along those lines made by Waldock.[1495] Thus, apart from the case of reservations to the constituent instruments of international organizations — which is dealt with in guideline 2.8.8 — it is hard to see what prohibitions could derive "implicitly" from a treaty, except in the cases covered by subparagraphs (a) and (b)[1496] of article 19,[1497] and it

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unless: (a) the reservation is prohibited by the treaty; (b) the treaty authorizes specified reservations which do not include the reservation in question" (*Yearbook ... 1966*, vol. II, p. 202). See also the commentary to guideline 3.1.2.

[1490] The "alternative proposals" *de lege ferenda* in 1953 in the first report submitted by Hersch Lauterpacht all refer to treaties that "[do] not prohibit or restrict the faculty of making reservations" (first report (A/CN.4/63), *Yearbook ... 1953*, vol. II, pp. 91–92).

[1491] C. Tomuschat, footnote 1084 above, p. 469.

[1492] See paragraph (3) above.

[1493] See, however, the statement by Yasseen, *Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, p. 149, para. 19: "the words 'the terms of' (*expressément*) could be deleted and it could read simply: '[unless] the making of reservations is prohibited by the treaty ...'. For it was enough that the treaty was not silent on the subject; it did not matter whether it referred to reservations implicitly or expressly" – but Yasseen was referring to the 1962 text.

[1494] Like, moreover, "those expressly or impliedly authorized", *Yearbook ... 1966*, vol. II, p. 205, para. (10) of the commentary; see also p. 207, para. (17). In the same vein, article 19, para. 1 (a) of the draft articles on the law of treaties concluded between States and international organizations or between two or more international organizations adopted by the Commission in 1981 places on equal footing cases where reservations are prohibited by treaties and those where it is "otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited" (*Yearbook ... 1981*, vol. II (Part Two), p. 137).

[1495] See paragraph (4) above. The Special Rapporteur indicated that, in drafting this clause, "what he had had in mind was the Charter of the United Nations, which, by its nature, was not open to reservations" (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 143, para. 60). This exception is covered by the safeguard clause of article 5 of the Convention (see footnote XXX above). The words "nature of the treaty" drew little attention during the discussion (Castrén, however, found the expression imprecise – *ibid.*, 652nd meeting, 28 May 1962, p. 166, para. 28; see also Verdross, *ibid.*, para. 35); it was deleted by the Drafting Committee (*ibid.*, 663rd meeting, 18 June 1962, p. 221, para. 3).

[1496] The amendments of Spain (A/CONF.39/C.1/L.147) and of the United States of America and Colombia (A/CONF.39/C.1/L.126 and Add.1) aimed at reintroducing the idea of the "nature" of the treaty in subparagraph (c) were withdrawn by their authors or rejected by the Drafting must be recognized that subparagraph (a) concerns only reservations expressly prohibited by the treaty. Moreover, this interpretation appears to be compatible with the relative flexibility that pervades all the provisions of the Convention that deal with reservations.

(7) There is no problem — other than determining whether or not the declaration in question constitutes a reservation[1498] — if the prohibition is clear and precise, in particular when it is a general prohibition, on the understanding, however, that there are relatively few such examples[1499] even if some are famous, such as that in article 1 of the Covenant of the League of Nations:

> "The original Members of the League shall be those of the Signatories (...) as shall accede without reservation to this Covenant."[1500]

Likewise, article 120 of the 1998 Rome Statute of the International Criminal Court states:

> "No reservations may be made to this Statute."[1501]

Committee (see the reaction of the United States, *Second Session*, *Summary records*, footnote 332 above, p. 37). During the Commission's discussion of guideline 3.1.1, some members stated the view that certain treaties, such as the Charter of the United Nations, by their very nature excluded any reservations. The Commission nonetheless concluded that this idea was consistent with the principle enunciated in subparagraph (c) of article 19 of the Vienna Conventions and that, where the Charter was concerned, the requirement of the acceptance of the competent organ of the organization (see article 20, para. 3, of the Vienna Conventions) provided sufficient guarantees.

[1497] This is also the final conclusion arrived at by C. Tomuschat, footnote 1084 above, p. 471.

[1498] See guideline 1.3.1 (Method of determining the distinction between reservations and interpretative declarations) and commentary.

[1499] Even in the area of human rights (see P.-H. Imbert, "Reservations and human rights conventions", *Human Rights Review* (1981), p. 28 or W.A. Schabas, footnote 969 above, p. 46; see, however, for example, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 7 September 1956 (article 9), the Convention against Discrimination in Education of 14 December 1960 (article 9, para. 7), Protocol No. 6 to the European Convention on Human Rights on the abolition of the death penalty of 28 April 1983 (article 4) or the European Convention against Torture of 26 November 1987 (article 21), which all prohibit any reservations to their provisions. Reservation clauses in human rights treaties sometimes refer to the provisions of the Vienna Convention concerning reservations (*cf.* article 75 of the American Convention on Human Rights) — which conventions containing no reservation clauses do implicitly — or reproduce its provisions (*cf.* article 28, para. 2, of the 1979 Convention on the Elimination of All Forms of Discrimination against Women or article 51, para. 2, of the 1989 Convention on the Rights of the Child).

[1500] It could be maintained that this rule was set aside when the Council of the League recognized the neutrality of Switzerland (in this respect, see M.H. Mendelson, footnote 1338 above, pp. 140 and 141).

[1501] However straightforward it may seem, this prohibition is not actually totally devoid of ambiguity: the highly regrettable article 124 of the Statute, which authorizes "a State on becoming a party [to] declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court" with respect to war crimes, constitutes an exception to the rule stated in article 120, for such declarations amount to reservations (see A. Pellet, "Entry into force and amendment of the Statute" in A. Cassese, P. Gaeta and J.R.W. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), vol. I, p. 157; see also the European Convention on the Service Abroad of Documents relating to Administrative Matters, article 21 of which prohibits reservations, while several other provisions authorize certain reservations. For other examples, see S. Spiliopoulou Åkermark, footnote 101 above, pp. 493 and 494; P. Daillier, M. Forteau and A. Pellet, footnote 254 above, p. 199; P.-H. Imbert, footnote 25 above, pp. 165 and 166; F. Horn, footnote 25 above, p. 113; R. Riquelme Cortado, footnote 150

And similarly, article 26, paragraph 1, of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal states:

> "No reservation or exception may be made to this Convention."[1502]

(8) Sometimes, however, the prohibition is more ambiguous. Thus, in accordance with paragraph 14 of the Final Act of the 1961 Geneva Conference which adopted the European Convention on International Commercial Arbitration, "the delegations taking part in the negotiation of the Convention ... declare that their respective countries do not intend to make any reservations to the Convention":[1503] not only is it not a categorical prohibition, but this declaration of intention is even made in an instrument separate from the treaty. In a case of this type, it could seem that reservations are not strictly speaking prohibited, but that if a State formulates a reservation, the other Parties should, logically, object to it.

(9) More often, the prohibition is partial and relates to one or more specified reservations or one or more categories of reservations. The simplest (but rather rare) situation is that of clauses listing the provisions of the treaty to which reservations are not permitted.[1504] Examples are article 42 of the Convention relating to the Status of Refugees of 28 July 1951[1505] and article 26 of the 1972 International Convention for Safe Containers of the International Maritime Organization.

(10) The situation where the treaty does not prohibit reservations to specified provisions but excludes certain categories of reservations is more complicated. An example of this type of clause is provided by article 78, paragraph 3, of the International Sugar Agreement of 1977:

> "Any Government entitled to become a Party to this Agreement may, on signature, ratification, acceptance, approval or accession, make reservations which do not affect the economic functioning of this Agreement …".

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above, pp. 105–108; W.A. Schabas, footnote 969 above, p. 46.

[1502] For a very detailed commentary, see Alessandro Fodella, "The Declarations of States Parties to the Basel Convention" in Tullio Treves (ed.), *Six Studies on Reservations, Comunicazioni e Studi*, vol. XXII, 2002, pp. 111–148; art. 26, para. 2, authorizes States parties to make "declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State". The distinction between the reservations of para. 1 and the declarations of para. 2 can prove laborious, but this is a problem of definition that does not in any way restrict the prohibition stated in para. 1: if a declaration made under para. 2 proves to be a reservation, it is prohibited. The combination of articles 309 and 310 of the 1982 Convention on the Law of the Sea poses the same problems and calls for the same responses (see, in particular, A. Pellet, "Les réserves aux conventions sur le droit de la mer", *La mer et son droit – Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec* (Paris, Pedone, 2003), pp. 505–517); see also the commentary to guideline 3.1.2.

[1503] Example given by P.-H. Imbert, footnote 25 above, pp. 166 and 167.

[1504] This situation is very similar to that in which the treaty specifies the provisions to which reservations are permitted – see paragraph (5) of the commentary to guideline 3.1.2 and the comments by Briggs (*Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962).

[1505] With regard to this provision, P.-H. Imbert notes that "*[l]'influence de l'avis [de la CIJ sur les* Réserves à la Convention sur le genocide *adopté deux mois auparavant] est très nette puisqu'une telle clause revient à preserver les dispositions qui ne pourront faire l'objet de réserves*" [the influence of the opinion [of the International Court of Justice on *Reservations to the Genocide Convention* adopted two months earlier] is very clear, since such a clause effectively protects the provisions which cannot be the object of reservations (footnote 25 above, p. 167); see the other examples given, *ibid.*, or in the commentary to guideline 3.1.2, paras. (5)–(8), below.

(11) The distinction between reservation clauses of this type and those excluding specified reservations was made in Sir Humphrey Waldock's draft in 1962.[1506] The Vienna Conventions themselves do not draw such distinctions, and, despite the uncertainty that prevailed while they were being drafted, it should certainly be assumed that subparagraph (a) of article 19 covers all the three situations that a more precise analysis can discern:

- Reservation clauses prohibiting all reservations;
- Reservation clauses prohibiting reservations to specified provisions;
- Lastly, reservation clauses prohibiting certain categories of reservations.

(12) This clarification seems particularly helpful in that the third of these situations poses problems (of interpretation)[1507] of the same nature as those arising from the criterion of compatibility with the object and purpose of the treaty, which certain clauses actually reproduce expressly.[1508] By indicating that these reservations, prohibited without reference to a specific provision of the treaty, still fall under article 19, subparagraph (a), of the Vienna Conventions, the Commission seeks from the outset to emphasize the unity of the legal regime applicable to the reservations mentioned in the three subparagraphs of article 19.

3.1.2 Definition of specified reservations

For the purposes of guideline 3.1, the expression "specified reservations" means reservations that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects.

Commentary

(1) A cursory reading of article 19, subparagraph (b), of the Vienna Conventions might suggest that it represents one side of the coin and subparagraph (a) represents the other. The symmetry is far from total, however. To have total symmetry, it would have been necessary to stipulate that reservations other than those expressly provided for in the treaty were prohibited. But that is not the case. Subparagraph (b) contains two additional elements which prevent oversimplification. The implicit prohibition of certain reservations arising from this provision, which is considerably more complex than it seems, depends on the fulfilment of three conditions:

(a) The treaty's reservation clause must permit the formulation of reservations;

(b) The reservations permitted must be "specified";

(c) It must be specified that "only" those reservations "may be made".[1509]

The purpose of guideline 3.1.2 is to clarify the meaning of the expression "specified reservations", which is not defined by the Vienna Conventions, since this clarification could have important consequences for the applicable legal regime; among other things, reservations which are not "specified" must pass the test of compatibility with the object and purpose of the treaty.[1510]

[1506] See *Yearbook ... 1962*, vol. II, p. 60.

[1507] "Whether a reservation is permissible under exceptions (a) or (b) will depend on interpretation of the treaty" (A. Aust, footnote 155 above, p. 136).

[1508] See the examples given in footnote 1499 above. This is one specific example of "categories of prohibited reservations" – quite vague in nature, it is true.

[1509] On the word "made", see the commentary to guideline 3.1, paras. (6)–(7), above.

(2) The origin of article 19, subparagraph (b), of the Vienna Conventions can be traced back to paragraph 3 of draft article 37 submitted to the Commission in 1956 by Fitzmaurice:

> "In those cases where the treaty itself permits certain specific reservations, or a class of reservations, to be made, there is a presumption that any other reservations are excluded and cannot be accepted."[1511]

Waldock took up that concept again in paragraph 1 (a) of draft article 17, which he proposed in 1962 and which the Commission used in paragraph 1 (c) of draft article 18. That draft article was adopted the same year[1512] and, following a number of minor drafting changes, was incorporated into article 16, subparagraph (b), of the 1966 draft,[1513] then into article 19 of the Convention. That course of action did not go unchallenged, however, as during the Vienna Conference a number of amendments were submitted with a view to deleting the provision[1514] on the pretext that it was "too rigid"[1515] or redundant because it duplicated subparagraph (a),[1516] or that it had not been confirmed by practice;[1517] all those amendments were, however, withdrawn or rejected.[1518]

(3) The only change to subparagraph (b) was introduced by a Polish amendment inserting the word "only" after the word "authorizes", which was accepted by the Drafting Committee of the Vienna Conference "in the interest of greater clarity".[1519] This bland description should

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[1510] See guideline 3.1.4 below.

[1511] First report (A/CN.4/101), *Yearbook ... 1956*, vol. II, p. 115; see also p. 127, para. 95.

[1512] See the commentary to guideline 3.1.1, paras. (3)–(4), above.

[1513] See footnote 1489 above.

[1514] Amendments by the United States of America and Colombia (A/CONF.39/C.1/L.126 and Add.1) and the Federal Republic of Germany (A/CONF.39/C.1/L.128), which were specifically designed to delete subparagraph (b), and by the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.115), France (A/CONF.39/C.1/L.169), Ceylon (A/CONF.39/C.1/L.139) and Spain (A/CONF.39/C.1/L.147), which proposed major revisions of article 16 (or of articles 16 and 17) that would also have led to the disappearance of that provision (for the text of these amendments, see *Documents of the Conference*, footnote 54 above, pp. 144 and 145, paras. 174–177). During the Commission's discussion of the draft, certain members had also taken the view that that provision was unnecessary (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, Yasseen, p. 149, para. 18; Tunkin, *ibid.*, p. 150, para. 29; but, for a more nuanced position, see *ibid.*, p. 151, para. 33; or Ruda, p. 154, para. 70).

[1515] According to the representatives of the United States of America and Poland at the 21st meeting of the Plenary Committee (10 April 1968, *First Session, Summary records* A/CONF.39/11, footnote 35 above, p. 117, para. 8, and p. 128, para. 42); see also the statement made by the representative of the Federal Republic of Germany (*ibid.*, p. 119, para. 23).

[1516] Colombia, *ibid.*, p. 123, para. 68.

[1517] Sweden, *ibid.*, p. 127, para. 29.

[1518] See *ibid.*, pp. 148–149, paras. 181–188 and the explanations of the Expert Consultant, Sir Humphrey Waldock, *First Session, Summary records* A/CONF.39/11, footnote 35 above, 24th meeting, 16 April 1968, p. 137, para. 6, and the results of the votes on those amendments, *ibid.*, 25th meeting, 16 April 1968, p. 146, paras. 23–25.

[1519] A/CONF.39/C.1/L.136; see *First Session, Summary records*, footnote 35 above, Plenary Committee, 70th meeting, 14 May 1968, p. 453, para. 16. Already in 1965, during the Commission's discussion of draft article 18, subparagraph (b), as reviewed by the Drafting Committee, Castrén proposed inserting "only" after "authorizes" in subparagraph (b) (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, p. 149, para. 14, and 813th meeting, 29 June 1965, p. 264, para. 13); see also the similar proposal made by Yasseen, *ibid.*, para. 11, which, in the end, was not accepted following a further review by the Drafting Committee (see *ibid.*, 816th meeting, p. 308, para. 41).

not obscure the vast practical implications of this clarification, which actually reverses the presumption made by the Commission and, in keeping with some Eastern countries' persistent effort to facilitate the formulation of reservations as much as possible, offers the possibility of doing so even when the negotiators have taken the precaution of expressly indicating the provisions in respect of which a reservation is permitted.[1520] This amendment does not, however, exempt a reservation which is neither expressly permitted nor implicitly prohibited from the requirement to observe the criterion of compatibility with the object and purpose of the treaty.[1521] Such a reservation may also be subject to objections on other grounds. This is why, in the wording of guideline 3.1.2, the Commission favoured the word "envisaged" over the word "authorized" to qualify the reservations in question, in contrast to the expression "reservation expressly authorized", as found in article 20, paragraph 1, of the Vienna Conventions.

(4) In practice, the types of clauses permitting reservations are comparable to those containing prohibitive provisions and pose the same kind of difficulties with regard to determining *a contrario* those reservations which may not be formulated:[1522]

- Some of them authorize reservations to particular provisions, expressly and limitatively listed either affirmatively or negatively;
- Others authorize specified categories of reservations;
- Lastly, others (few in number) authorize reservations in general.

(5) Article 12, paragraph 1, of the 1958 Geneva Convention on the Continental Shelf appears to illustrate the first of those categories:

> "At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive."[1523]

As Ian Sinclair noted, "Article 12 of the 1958 Convention did not provide for *specified reservations*, even though it may have specified articles to which reservations might be made",[1524] and neither the scope nor the effects of that authorization are self-evident, as demonstrated by the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases[1525] and, above all, by the arbitral award rendered in 1977 in the case concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*.[1526]

[1520] See F. Horn, footnote 25 above, p. 114; L. Lijnzaad, footnote 463 above, p. 39; J.-M. Ruda, footnote 56 above, p. 181; or R. Szafarz, footnote 27 above, pp. 299–300. Such restrictive formulas are not unusual – see, for example, article 17, para. 1, of the Convention on the Reduction of Statelessness of 1954 ("1. At the time of signature, ratification or accession any State may make a reservation in respect of articles 11, 14 or 15. 2. No other reservations to this Convention shall be admissible") and the other examples given by R. Riquelme Cortado, footnote 150 above, pp. 128–129, A. Pellet "Article 19 (1969)", footnote 1454 above, pp. 720–721, paras. 159–163; A. Pellet, 1969 Vienna Convention Article 19, footnote 1454 above, pp. 437–439, paras. 83–87. On the significance of the reversal of the presumption, see also M. Robinson, *Yearbook ... 1995*, vol. I, 2402nd meeting, p. 158, para. 17.

[1521] See guideline 3.1.3 and commentary, in particular paras. (2)–(3), below.

[1522] See guideline 3.1.1 and commentary, above.

[1523] Article 309 of the United Nations Convention on the Law of the Sea provides: "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention" (on this provision, see A. Pellet, footnote 1502 above pp. 505–511). A treaty may set a maximum number of reservations or provisions that can be subject to reservations (see, for example, article 25 of the 1967 European Convention on the Adoption of Children). These provisions may be compared with those authorizing parties to accept certain obligations or to choose between the provisions of a treaty, which are not reservation clauses *stricto sensu* (see guideline 1.5.3 and commentary).

[1524] I. Sinclair, footnote 129 above, p. 73. On the distinction between specified and non-specified reservations, see also paras. (11)–(13) below.

(6) In that case, the Arbitral Tribunal emphasized that:

> "Article 12 [of the 1958 Geneva Convention on the Continental Shelf], by its clear terms, authorised any contracting State, including the French Republic, to make its consent to be bound by the Convention subject to reservations to articles other than Articles 1 to 3 inclusive.[1527]

However,

> "Article 12 cannot be read as committing States to accept in advance any and every reservation to articles other than Articles 1, 2 and 3 … Such an interpretation of Article 12 would amount almost to a license to contracting States to write their own treaty and would manifestly go beyond the purpose of the Article. Only if the Article had authorised the making of specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance. But this is not the case with Article 12, which authorises the making of reservations to articles other than Article 1 to 3 in quite general terms."[1528]

(7) The situation is different when the reservation clause defines the categories of permissible reservations. Article 39 of the General Act of Arbitration of 1928 provides an example of this:

> "1. In addition to the power given in the preceding article[[1529]], a Party, in acceding to the present General Act, may make his acceptance conditional upon the reservations exhaustively enumerated in the following paragraph. These reservations must be indicated at the time of accession.
>
> "2. These reservations may be such as to exclude from the procedure described in the present Act:
>
> "(a) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said party may have a dispute;
>
> "(b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States;
>
> "(c) Disputes concerning particular cases or clearly specified subject matters, such as territorial status, or disputes falling within clearly defined categories."

As the International Court of Justice pointed out in its judgment of 1978 in the *Aegean Sea Continental Shelf* case:

> "When a multilateral treaty thus provides in advance for the making only of particular, designated categories of reservations, there is clearly a high probability, if not an actual

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[1525] See Judgment of 20 February 1969, *I.C.J. Reports 1969*, pp. 38–41.

[1526] Decision of 30 June 1977, *UNRIAA*, vol. XVIII, pp. 32–35, paras. 39–44. See footnote 24 above.

[1527] *Ibid.*, pp. 32–33, para. 39.

[1528] *Ibid.*

[1529] Article 38 provides that Parties may accede to only parts of the General Act.

> presumption, that reservations made in terms used in the treaty are intended to relate to the corresponding categories in the treaty",

even when States do not "meticulously" follow the "pattern" set out in the reservation clause.[1530]

(8) Another particularly famous and widely discussed example[1531] of a clause authorizing reservations (which falls under the second category mentioned above)[1532] is found in article 57 (ex 64) of the European Convention on Human Rights:

> "1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
>
> "2. Any reservation made under this article shall contain a brief statement of the law concerned."

In this instance, the right to formulate reservations is limited by conditions relating to both form and content; in addition to the usual limitations *ratione temporis*,[1533] a reservation to the Convention must:

[1530] Judgment of 19 December 1978, *I.C.J. Reports 1978*, p. 28, para. 55.

[1531] See A. Bonifazi, "La disciplina delle riserve alla Convenzione europea dei diritti dell'uomo", in *Les clauses facultatives de la Convention européenne des droits de l'homme* (Minutes of the round table organized in Bari on 17 and 18 December 1973 by the Faculty of Law of the University of Bari) (Bari, Levante, 1974), pp. 301–319; G. Cohen-Jonathan, *La Convention européenne des droits de l'homme* (Paris, Economica, 1989), pp. 86–93; J.A. Frowein, "Reservations to the European Convention on Human Rights", *Protecting Human Rights: The European Dimension. Studies in Honour of Gerard J. Warda* (Cologne; C. Heymanns Verlag, 1988), pp. 193–200; P.-H. Imbert, "Reservations to the European Convention on Human Rights before the Strasbourg Commission: the *Temeltasch* case", ICLQ, vol. 33 (1984), pp. 558–595; R. Kühner, "Vorbehalte und auslegende Erklärungen zur Europäischen Menschenrechtskonvention. Die Problematik des Art. 64 MRK am Beispiel der schweizerischen 'auslegenden Erklärung' zu Art. 6 Abs. 3 lit. e MRK", ZaöRV, vol. 42 (1982), pp. 58–92 (summary in English); S. Marcus-Helmons, "L'article 64 de la Convention de Rome ou les réserves à la Convention européenne des droits de l'homme", *Revue de droit international et de droit comparé*, 1968, pp. 7–26; M.J. Morais Pires, *As reservas a Convenção europeia dos direitos do homen* (Coimbra, Portugal, Livraria Almedina, 1997), p. 493; R. Sapienza, "Sull'ammissibilità di riserve all'accettazione della competenza della Commissione europea dei diritti dell'uomo", *Rivista di Diritto internazionale*, 1987, pp. 641–653; W.A. Schabas, footnote 137 above, pp. 923–942; Susan Marks, "Three regional human rights treaties and their experience of reservations" in J.P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (British Institute of International and Comparative Law, 1997), p. 35; and J. Dhommeaux, "La coordination des réserves et des déclarations à la Convention européenne des droits de l'homme et au Pacte international relatif aux droits civils et politiques" in J.-F. Flauss and M. de Salvia (eds.), *La Convention européenne des droits de l'homme – développements récents et nouveaux défis* (Brussels, Bruylant, 1997), pp. 13–37.

[1532] Para. (4). For other examples, see A. Aust, footnote 155 above, pp. 135–136; S. Spiliopoulou Åkermark, footnote 101 above, pp. 495–496; W. Bishop, footnote 288 above, pp. 323 and 324; or P. Daillier, M. Forteau and A. Pellet, footnote 254 above, p. 181; see also the table of Council of Europe conventions showing clauses falling into each of the first two categories of permissible reservation clauses mentioned in para. (4) above, in R. Riquelme Cortado, footnote 150 above, p. 125, and the other examples of partial authorizations given by this author, pp. 126–129.

- Refer to a particular provision of the Convention;
- Be justified by the state of the legislation in the reserving State at the time that the reservation is formulated;
- Not be "couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope";[1534] and
- Be accompanied by a brief statement explaining "the scope of the Convention provision whose application a State intends to prevent by means of a reservation".[1535]

Assessing whether each of these conditions has been met raises problems. It must surely be considered, however, that the reservations authorized by the Convention are "specified" within the meaning of article 19 (b) of the Vienna Conventions and that only such reservations are permissible.

(9) It has been noted that the wording of article 57 of the European Convention on Human Rights is not fundamentally different[1536] from that used, for example, in article 26, paragraph 1, of the European Convention on Extradition of 1957:

> "Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention",

even though the latter could be interpreted as a general authorization. While, however, the type of reservations that can be formulated to the European Convention on Human Rights is "specified", here the authorization is restricted only by the exclusion of across-the-board reservations.[1537]

(10) In fact, a general authorization of reservations[1538] itself does not necessarily resolve all the problems. It leaves unanswered the question whether the other Parties may still object to reservations[1539] and whether these authorized reservations[1540] are subject to the test of compatibility with the object and purpose of the treaty.[1541] The latter question is addressed by guideline 3.1.4, which draws a distinction between specified reservations whose reservation clause defines the content and those which leave the content relatively open.

[1533] See para. (4) of the commentary to guideline 3.1.

[1534] *Belilos* case, judgement of 29 April 1988, E.C.H.R. *Series A*, vol. 132, p. 25, para. 55.

[1535] Report of the European Commission of Human Rights of 5 May 1982, *Temeltasch*, Application No. 9116/80, *European Commission of Human Rights Yearbook*, vol. 25, para. 90.

[1536] P.-H. Imbert, footnote 25 above, p. 186; see also R. Riquelme Cortado, footnote 150 above, p. 122.

[1537] Regarding this concept, see guideline 1.1, paragraph 2, and paragraphs (16) to (22) of the commentary.

[1538] For another even clearer example, see article 18, paragraph 1, of the European Convention on the Compensation of Victims of Violent Crimes of 1983: "Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of one or more reservations."

[1539] This is sometimes expressly stated (see, for example, article VII of the Convention on the Political Rights of Women of 1952 and the comments in that regard of R. Riquelme Cortado, footnote 150 above, p. 121).

[1540] It cannot be reasonably argued that subparagraph (b) could include "implicitly authorized" reservations – other than on the grounds that any reservations that are not prohibited are, *a contrario*, authorized, subject to the provisions of subparagraph (c).

[1541] See the questions raised by S. Spiliopoulou Åkermark, footnote 101 above, pp. 496–497, or R. Riquelme Cortado, footnote 150 above, p. 124.

(11) This distinction is not self-evident. It caused particular controversy following the 1977 arbitral award in the case concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*. Some authors thought that a reservation was "specified" if the treaty set precise limits within which it could be formulated; those criteria then superseded (but only in that instance) the criterion of the object and purpose.[1542] Others pointed out that that occurred very exceptionally, perhaps only in the rare case of "negotiated reservations",[1543] and, furthermore, that the Commission had not retained Rosenne's proposal that the expression "specified reservations", which he considered "unduly narrow", should be replaced by "reservations to specific provisions";[1544] accordingly, it would be unrealistic to require the content of specified reservations to be established with precision by the treaty, otherwise subparagraph (b) would be rendered meaningless.[1545] According to a third view, a compromise was possible between the undoubtedly excessive position that would require the content of the reservations envisaged to be precisely stated in the reservation clause and the position that equated a specified reservation with a "reservation expressly authorized by the treaty",[1546] even though articles 19, paragraph (b), and article 20, paragraph 1, use different expressions. Consequently, it was suggested that it should be recognized that reservations that were specified within the meaning of article 19, subparagraph (b) (and of guideline 3.1 (b)), must, on the one hand, relate to specific provisions and, on the other, fulfil certain conditions specified in the treaty, but without going so far as to require their content to be predetermined – that was the position finally taken by the Commission.

(12) The case law is not very helpful in reconciling those opposing views. The arbitral award of 1977, invoked by the proponents of both arguments, says more about what a specified reservation is not than what it is.[1547] The conclusion to be drawn is that the mere fact that a reservation clause authorizes reservations to particular provisions of the treaty is not enough to "specify" these reservations within the meaning of article 19, subparagraph (b).[1548] The Tribunal, however, confined itself to requiring reservations to be "specific",[1549] without indicating what the test of that specificity was to be. In addition, during the Vienna

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[1542] Derek W. Bowett, footnote 150 above, pp. 71–72.

[1543] On this concept, see the commentary to guideline 1.1.8 (Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of a treaty), para. (10). See also W.P. Gormley, footnote 115, p. 59 and pp. 75–76. *Cf.* the annex to the European Convention on Civil Liability for Damage caused by Motor Vehicles, which accords to Belgium the faculty over a period of three years to make a specific reservation, or article 32, paragraph 1 (b), of the European Convention on Transfrontier Television of 1989, which exclusively grants the United Kingdom the ability to formulate a specified reservation; examples provided by S. Spiliopoulou Åkermark, footnote 101 above, p. 499. The main example given by D. Bowett to illustrate his theory relates precisely to a "negotiated reservation" footnote 150 above, p. 71).

[1544] *Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, p. 264, para. 7. P.-H. Imbert, footnote 1019, p. 52, points out, however, that, even though Mr. Rosenne's proposal was not accepted, Sir Humphrey Waldock himself had also drawn this parallel (*Yearbook ... 1965*, vol. I, p. 265, para. 27).

[1545] P.-H. Imbert, *ibid.*, pp. 50–53.

[1546] In this connection, see P.-H. Imbert, *ibid.*, p. 53.

[1547] See paragraph (6) above.

[1548] See paragraphs (6)–(7) above.

[1549] In reality, it is the authorization that must apply to specific or specified reservations – terms which the Tribunal considered to be synonymous, in the case concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*.

Conference, Yasseen, Chairman of the Drafting Committee, assimilated specified reservations to those which were expressly authorized by the treaty[1550] with no further clarification.

(13) Accordingly, the Commission considered that a reservation should be considered specified if a reservation clause indicated the treaty provisions in respect of which a reservation was possible or, to take into account of the across-the-board reservations envisaged in guideline 1.1, paragraph 2,[1551] indicated that reservations were possible to the treaty as a whole with respect to certain specific aspects. The divergence between these different points of view should not be overstated, however; while the expression "reservations envisaged", which was preferred to "reservations authorized", undoubtedly gives more weight to the broad-brush approach favoured by the Commission, at the same time, in guideline 3.1.4, the Commission introduced a distinction between specified reservations with defined content and those whose content is not defined, the latter being subject to the test of compatibility with the object and purpose of the treaty.

3.1.3 Permissibility of reservations not prohibited by the treaty

Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

Commentary

(1) Guidelines 3.1.3 and 3.1.4 specify the scope of article 19, subparagraphs (a) and (b), of the Vienna Conventions (the 1986 text of which is repeated in guideline 3.1). They make explicit what the Conventions leave implicit, that is, that failing a contrary provision in the treaty — and in particular if the treaty authorizes specified reservations as defined in guideline 3.1.2 — any reservation must satisfy the basic requirement, set forth in article 19, subparagraph (c), of not being incompatible with the object and purpose of the treaty.

(2) This principle is one of the fundamental elements of the flexible system established by the Vienna regime, moderating the "radical relativism"[1552] resulting from the pan-American system, which reduces multilateral treaties to a network of bilateral relations,[1553] while avoiding the rigidity resulting from the system of unanimity.

(3) Since its first appearance in connection with reservations in the advisory opinion of the International Court of Justice of 1951,[1554] the notion of the object and purpose of the treaty[1555] has become increasingly accepted. It has become a means of striking a balance between the need to preserve the essence of the treaty and the desire to facilitate accession to multilateral treaties by the greatest possible number of States. There is, however, a major difference between the role of the criterion of compatibility with the object and purpose of the

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[1550] A/CONF.39/C.1/SR.70, para. 23.

[1551] See guideline 1.1 and paragraphs (16)-(22) of the commentary.

[1552] P. Reuter, footnote 28 above, p. 73, para. 130. This author applies the term to the system adopted by the International Court of Justice in its 1951 advisory opinion on *I.C.J. Reports 1951*, footnote 604 above, p. 15; the criticism applies perfectly well, however, to the pan-American system.

[1553] On the pan-American system, see the bibliography in P.-H. Imbert, footnote 25 above, pp. 485–486. In addition, aside from the description by P.-H. Imbert himself (*ibid.*, pp. 33–38), see M.M. Whiteman, footnote 25 above, pp. 141–144 or J.M. Ruda, footnote 56 above, pp. 115–133.

[1554] *I.C.J. Reports 1951*, footnote 604 above, pp. 24 and 26.

[1555] This notion is defined in guideline 3.1.5.

treaty according to the 1951 advisory opinion, on the one hand, and article 19, subparagraph (c), of the Convention, on the other.[1556] In the advisory opinion, the criterion was applied equally to the formulation of reservations and to objections:

> "The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them."[1557]

In the Vienna Conventions, it is restricted to reservations: article 20 does not restrict the ability of other contracting States and organizations to formulate objections.

(4) While there is no doubt that this requirement that a reservation must be compatible with the object and purpose of the treaty now represents a rule of customary law which is unchallenged,[1558] its content remains vague[1559] and there is some uncertainty as to the consequences of incompatibility.[1560] Moreover, article 19 does not dispel the ambiguity as to its scope of application.

(5) The principle set forth in article 19, subparagraph (c), whereby a reservation incompatible with the object and purpose of the treaty may not be formulated, is of a subsidiary nature since it applies only in cases not covered in article 20, paragraphs 2 and 3, of the Convention[1561] and where the treaty itself does not resolve the reservations issue.

(6) If the treaty does regulate reservations, a number of cases must be distinguished which offer different answers to the question whether the reservations concerned are subject to the test of compatibility with the object and purpose of the treaty. In two of these cases the answer is clearly negative:

- There is no doubt that a reservation expressly prohibited by the treaty cannot be held to be valid on the pretext that it is compatible with the object and purpose of the treaty;[1562]

[1556] See M. Coccia, footnote 196 above, p. 9; L. Lijnzaad, footnote 463 above, p. 40; Manuel Rama-Montaldo, "Human rights Conventions and Reservations to Treaties", *Héctor Gros Espiell Amicorum Liber*, vol. II (Brussels, Bruylant, 1997), pp. 1265–1266; or I. Sinclair, footnote 129 above, p. 61.

[1557] *I.C.J. Reports 1951*, footnote 604 above, p. 24.

[1558] See the many arguments to that effect given by C. Riquelme Cortado, footnote 150 above, pp. 138–143. See also the Commission's 1997 preliminary conclusions, in which it reiterated its view that "articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986 govern the regime of reservations to treaties and that, in particular, the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations", *Yearbook … 1997*, vol. II (Part Two), p. 57, para. 1. See also A. Pellet, "Article 19 (1969)" footnote 1454 above, pp. 728–740, paras. 172–196; A. Pellet, 1969 Vienna Convention Article 19, footnote 1454 above, pp. 443–451, paras. 95–115. The word "*licéité*" should be understood as corresponding to "validity", the term that the Commission ultimately adopted to refer collectively to the conditions to which reservations, some objections and interpretative declarations are subject (with regard to the choice of this term, see *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 324–327, para. 159. See also paras. (4) to (7) of the general commentary to Part 3 of the Guide to Practice.

[1559] See guidelines 3.1.5 to 3.1.5.7.

[1560] See guidelines 3.3 to 3.3.3.

[1561] In the case of treaties with limited participation and the constituent instruments of international organizations. These cases do not constitute instances where there is an implicit prohibition against formulating reservations; they reintroduce the system of unanimity for particular types of treaties.

[1562] In its observations on the draft adopted on first reading by the Commission, Canada had suggested that "consideration should be given to extending the criterion of 'compatibility with

- The exception also applies to "specified" reservations that are expressly authorized by the treaty, with a defined content: they are automatically valid without having to be accepted by the other contracting States and organizations[1563] and they are not subject to the test of compatibility with the object and purpose of the treaty.[1564]

In the Commission's view, these obvious truths are not worth mentioning in separate provisions of the Guide to Practice; they follow directly and inevitably from article 19, subparagraph (c), of the Vienna Conventions, the text of which is repeated in guideline 3.1.

(7) The same is not true of two other cases which arise *a contrario* out of the provisions of article 19, subparagraphs (a) and (b):

- Those in which a reservation is authorized because it does not fall under the category of prohibited reservations (subparagraph (a));
- Those in which a reservation is authorized without being "specified" within the meaning of subparagraph (b) as spelt out in guideline 3.1.2.

(8) In both these cases, it cannot be presumed that treaty-based authorization to formulate reservations offers States or international organizations *carte blanche* to formulate any reservation they wish, even if it would be incompatible with the object and purpose of the treaty.

(9) On the subject of implicitly authorized reservations, Waldock recognized, in his fourth report on the law of treaties, that "a conceivable exception [to the principle of the automatic permissibility of reservations permitted by the treaty] might be where a treaty expressly forbids certain specified reservations and thereby implicitly permits others; for it might not be unreasonable to regard compatibility with the object and purpose as still an implied limitation on the making of other reservations". However, he excluded that eventuality not because this was untrue but because "this may, perhaps, go too far in refining the rules regarding the intentions of the parties, and there is something to be said for keeping the rules in article 18 [which became article 19 of the Convention] as simple as possible".[1565] These considerations do not apply to the Guide to Practice, the aim of which is precisely to provide States with coherent answers to all questions they may have in the area of reservations.

(10) This is why guideline 3.1.3 stipulates that reservations which are "implicitly authorized" because they are not formally excluded by the treaty must be compatible with the object and purpose of the treaty. It would be paradoxical, to say the least, if reservations to treaties containing reservations clauses should be admitted more freely than in the case of treaties which contain no such clauses.[1566] Thus the criterion of compatibility with the object and purpose of the treaty applies.

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the object and purpose' equally to reservations made pursuant to express treaty provisions in order not to have different criteria for cases where the treaty was silent on the making of reservations and cases where it permitted them." (Sir Humphrey Waldock, fourth report, A/CN.4/177, *Yearbook ... 1965*, vol. II, p. 46). That proposal, which was not very clear, was not retained by the Commission; *cf.* the clearer proposals along the same lines by Briggs in *Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 222, paras. 13 and 14, and *Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, p. 264, para. 10; *contra*: Ago, *ibid.*, para. 16.

[1563] *Cf.* article 20, para. 1.

[1564] See guideline 3.1.2 and commentary thereto.

[1565] Report (A/CN.4/177), *Yearbook ... 1965*, vol. II, p. 50, para. 4.

[1566] In that vein, Rosenne in *Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, pp. 148–149, para. 10. C. Tomuschat gives a pertinent example: "If, for example, a convention on the protection of human rights prohibits in a 'colonial clause' the exception of dependent territories

3.1.4 Permissibility of specified reservations

Where the treaty envisages the formulation of specified reservations without defining their content, a reservation may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

Commentary

(1) Guideline 3.1.3 explains that reservations not prohibited by the treaty are still subject to the criterion of compatibility with the object and purpose of the treaty. Guideline 3.1.4 makes the same clarification with regard to specified reservations in the sense of guideline 3.1.1 where the treaty does not define the content of the reservation: the same problem arises, and the considerations put forward in support of guideline 3.1.3 apply *mutatis mutandis*.

(2) The Polish amendment to subparagraph (b), adopted by the Vienna Conference in 1968, restricted the possibility of implicit prohibition of reservations to treaties which provided "that *only* specified reservations, which do not include the reservation in question, may be formulated".[1567] But it does not follow that reservations thus authorized may be made at will: the arguments applicable to non-prohibited reservations[1568] apply here, and if one accepts the broad definition of specified reservations adopted by the Commission,[1569] a distinction must be drawn between reservations whose content is defined in the treaty itself and those which are permitted in principle but which there is no reason to suppose should be allowed to deprive the treaty of its object or purpose. The latter must be subject to the same general conditions as reservations to treaties which do not contain specific clauses.

(3) The modification made to article 19, subparagraph (c), of the 1969 Vienna Convention following the Polish amendment in fact supports that conclusion. In the Commission's text, subparagraph (c) was drafted as follows:

> "(c) In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty."[1570]

This was consistent with subparagraph (b), which prohibited the formulation of reservations other than those authorized by a reservations clause. Once an authorization was no longer interpreted *a contrario* as automatically excluding other reservations, the formula could not be retained;[1571] it was therefore changed to the current wording by the Drafting Committee of the Vienna Conference.[1572] The result is, *a contrario*, that if a reservation does not fall within

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from the territorial scope of the treaty, it would be absurd to suppose that consequently reservations of any kind, including those relating to the most elementary guarantees of individual freedom, are authorised, even if by these restrictions the treaty would be deprived of its very substance" (footnote 1084 above, p. 474).

[1567] See commentary to guideline 3.1.2, para. (3).

[1568] See commentary to guideline 3.1.3, para. (9).

[1569] See commentary to guideline 3.1.2, para. (13).

[1570] *Yearbook ... 1966*, vol. II, p. 202.

[1571] Poland had not, however, put forward any amendment to subparagraph (c) drawing the consequences from the amendment it had successfully proposed for subparagraph (b). An amendment by Viet Nam, however, intended to delete the phrase "in cases where the treaty contains no provisions regarding reservations" (A/CONF.39/C.1/L.125), *Documents of the Conference*, footnote 54 above, p. 145, para. 177, was rejected by the plenary Commission (*ibid.*, p. 148, para. 181).

[1572] Curiously, the reason given by the Chairman of the Drafting Committee makes no connection between the modifications made to subparagraphs (b) and (c). K. Yasseen merely stated that "certain members of the Committee considered that a treaty could conceivably contain the scope of subparagraph (b) (because its content is not specified), it is subject to the test of compatibility with the object and purpose of the treaty.

(4) That was, indeed, the reasoning followed by the arbitral tribunal which settled the dispute concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic* in deciding that the mere fact that article 12 of the Geneva Convention on the Continental Shelf authorized certain reservations without specifying their content[1573] did not necessarily mean that such reservations were automatically permissible.[1574] In such cases, the permissibility of the reservation "cannot be assumed simply on the ground that it is, or purports to be, a reservation to an article to which reservations are permitted".[1575] Its permissibility must be assessed in the light of its compatibility with the object and purpose of the treaty.

(5) *A contrario*, it goes without saying that when the content of a specified reservation is indeed indicated in the reservations clause itself, a reservation consistent with that provision is not subject to the test of compatibility with the object and purpose of the treaty.

3.1.5 Incompatibility of a reservation with the object and purpose of the treaty

A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the *raison d'être* of the treaty.

Commentary

(1) The compatibility of a reservation with the object and purpose of the treaty constitutes, in the terms of article 19, subparagraph (c) of the Vienna Convention, reflected in guideline 3.1, subparagraph (c), the fundamental criterion for the permissibility of a reservation. It is also the criterion that poses the most difficulties.

(2) In fact the concept of the object and purpose of the treaty is far from being confined to reservations. In the Vienna Convention, it occurs in eight provisions,[1576] only two of which — articles 19, subparagraph (c), and 20, paragraph 2 — concern reservations. However, none of them defines the concept of the object and purpose of the treaty or provides

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provisions on reservations which did not come under any of the categories envisaged in subparagraphs (a) and (b)" (*First Session, Summary records*, footnote 35 above, plenary Commission, 70th meeting, 14 May 1968, p. 452, para. 17). *Cf.* a remark by Briggs to the same effect during discussions in the Commission in 1965 (*Yearbook ... 1965*, vol. I, 796th meeting, 4 June 1965, p. 146, para. 37).

[1573] See the commentary to guideline 3.1.2, para. (5).

[1574] *UNRIAA*, vol. XVIII, pp. 32–33, para. 39. See the commentary to guideline 3.1.2, para. (6).

[1575] D. Bowett, footnote 150 above, p. 72. In the same vein, J.M. Ruda, footnote 56 above, p. 182; or Gérard Teboul, "Remarques sur les réserves aux conventions de codification", *Revue générale de droit international public*, 1982, pp. 691–692. *Contra:* P.-H. Imbert, footnote 1544 above, pp. 50–53; this opinion, very well argued, does not sufficiently take into account the consequences of the modification made to subparagraph (c) at the Vienna Conference (*cf.* above para. (3)).

[1576] *Cf.* articles 18, 19 (c), 20, paragraph 2, 31, paragraph 1, 33, paragraph 4, 41, paragraph 1 (b) (ii), 58, paragraph 1 (b) (ii), and 60, paragraph 3 (b). A connection can be made with the provisions relating to the "essential bases" or "conditions of the consent to be bound" (see P. Reuter, footnote 505 above, p. 627 (also reproduced in Paul Reuter, *Le développement de l'ordre juridique international — Écrits de droit international* (Paris, Économica, 1999), p. 366)).

any particular "clues" for this purpose.[1577] At most, one can infer that a fairly general approach is required: it is not a question of "dissecting" the treaty in minute detail and examining its provisions one by one, but of extracting the "essence", the overall "mission" of the treaty:

- It is unanimously accepted that article 18, subparagraph (a), of the Convention does not oblige a signatory State to comply with the treaty, but merely to refrain from rendering the treaty inoperative prior to its expression of consent to be bound;[1578]

- Article 58, paragraph 1 (b) (ii), is drafted in the same spirit: one can assume that it is not a case of compelling respect for the treaty, the very object of this provision being to determine the conditions in which the operation of the treaty may be suspended, but rather of preserving what is essential in the eyes of the contracting States;

- Article 41, paragraph 1 (b) (ii), is also aimed at safeguarding the "effective execution ... of the treaty *as a whole*"[1579] in the event that it is modified between certain of the contracting States only;

- Likewise, article 60, paragraph 3 (b), defines a "material breach" of the treaty, in contrast to other breaches, as "the violation of a provision *essential*" [to the treaty]; and

- According to articles 31, paragraph 1, and 33, paragraph 4, the object and purpose of the treaty are supposed to "clarify" its overall meaning thereby facilitating its interpretation.[1580]

(3) There is little doubt that the expression "object and purpose of the treaty" has the same meaning in all of these provisions: one indication of this is that Waldock, who without exaggeration can be considered to be the father of the law of reservations to treaties in the Vienna Convention, referred to them[1581] explicitly in order to justify the inclusion of this criterion in article 19, subparagraph (c), through a kind of *a fortiori* reasoning: since "the objects and purposes of the treaty ... are criteria of fundamental importance for the interpretation ... of a treaty" and since "the Commission has proposed that a State which has signed, ratified, acceded to, accepted or approved a treaty should, even before it comes into force, refrain from acts calculated to frustrate its objects", it would seem "somewhat strange if a freedom to make reservations incompatible with the objects and purposes of the treaty were to be recognized".[1582] However, this does not solve the problem: it simply demonstrates that

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[1577] As Isabelle Buffard and Karl Zemanek have noted, the Commission's commentaries to the draft article in 1966 are virtually silent on the matter ("The 'Object and Purpose' of a Treaty: An Enigma?", *Austrian Review of International and European Law*, vol. 3 (1998), p. 322).

[1578] See, for example, P. Reuter, footnote 28 above, p. 62, who defines the obligation arising from article 18 as an obligation of conduct; Philippe Cahier, "L'obligation de ne pas priver un traité de son object et de son but avant son entrée en vigueur", *Mélanges Fernand Dehousse* (Paris, Nathan, 1982), vol. I, p. 31; or P. Palchetti, "Article 18 of the 1969 Vienna Convention: a Vague and Ineffective Obligation or a Useful Means for Strengthening Cooperation", in Enzo Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention*, (Oxford: Oxford University Press, 2011), pp. 25–36.

[1579] In this provision, the words "of the object and purpose", which are replaced by an ellipsis in the above quotation, obscure rather than clarify the meaning.

[1580] See *Pajzs, Csáky and Esterházy*, Judgment of 16 December 1936, *P.C.I.J., Series A/B, No. 68*, p. 60; see also Suzanne Bastid, *Les traités en droit international public – conclusion et effets* (Paris, Economica, 1985), p. 131, or Serge Sur, *L'interprétation en droit international public* (Paris: L.G.D.J., 1974), pp. 227–230.

[1581] More precisely, to (the current) articles 18 and 31.

[1582] Fourth report (A/CN.4/177), *Yearbook ... 1965*, vol. II, p. 51, para. 6.

there is a criterion, a unique and versatile criterion, but as yet no definition. As has been noted, "the object and purpose of a treaty are indeed something of an enigma".[1583] It is certainly true that the attempt made in article 19, subparagraph (c), pursuant to the 1951 advisory opinion by the International Court of Justice,[1584] to introduce an element of objectivity into a largely subjective system is not entirely convincing:[1585] "The claim that a particular reservation is contrary to object and purpose is easier made than substantiated."[1586] In their joint opinion, the dissenting judges in 1951 had criticized the solution retained by the majority in the advisory opinion on *Reservations to the Genocide Convention*, emphasizing that it could not "produce final and consistent results",[1587] and that had been one of the main reasons for the Commission's resistance to the flexible system adopted by the Court in 1951:

> "Even if the distinction between provisions which do and those which do not form part of the object and purpose of a convention be regarded as one that it is intrinsically possible to draw, the Commission does not see how the distinction can be made otherwise than subjectively."[1588]

(4) Waldock himself still expressed hesitation in his all-important first report on the law of treaties in 1962:[1589]

> "... the principle applied by the Court is essentially subjective and unsuitable for use as a general test for determining whether a reserving State is or is not entitled to be considered a party to a multilateral treaty. The test is one which might be workable if the question of 'compatibility with the object and purpose of the treaty' could always be brought to independent adjudication; but that is not the case ...
>
> "Nevertheless, the Court's criterion of 'compatibility with the object and purpose of the convention' does express a valuable concept to be taken into account both by States formulating a reservation and by States deciding whether or not to consent to a

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[1583] I. Buffard and K. Zemanek, footnote 1577 above, p. 342. The uncertainties surrounding this criterion have been noted (and criticized with varying degrees of harshness) in all the scholarly writing: see, for example, A. Aust, footnote 155 above, p. 111; Pierre-Marie Dupuy, *Droit international public*, 8th ed. (Paris, Dalloz, 2006), p. 286; Gerald G. Fitzmaurice, "Reservations to multilateral conventions", *International and Comparative Law Quarterly*, vol. 2 (1953), p. 12; M. Rama-Montaldo, footnote 1556, p. 1265; C. Rousseau, footnote 351 above, p. 126; Gérard Teboul, "Remarques sur les réserves aux traités de codification", *Revue générale de droit international public*, vol. 86 (1982), pp. 695–696; A. Pellet, preliminary report (A/CN.4/470), p. 51, para. 109; or Frédérique Coulée, "A propos d'une controverse autour d'une codification en cours: les réactions aux réserves incompatibles avec l'objet et le but des traités de protection des droits de l'homme", *Mélanges offerts à Gérard Cohen-Jonathan* (Brussels, Bruylant, 2004), pp. 501–521.

[1584] See *I.C.J. Reports 1951*, footnote 604 above, p. 24: "It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation."

[1585] According to Jean Kyongun Koh, "[t]he International Court thereby introduced purposive words into the vocabulary of reservations which had previously been dominated by the term 'consent'" ("Reservations to multilateral treaties: how international legal doctrine reflects world vision", *Harvard International Law Journal*, vol. 23 (1982), p. 85).

[1586] L. Lijnzaad, footnote 463 above, pp. 82–83.

[1587] *I.C.J. Reports 1951*, footnote 604 above, p. 44.

[1588] *Yearbook ... 1951*, vol. II, p. 128, para. 24.

[1589] It was this first report (A/CN.4/144) that introduced the "flexible system" to the Commission and vigorously defended it (*Yearbook ... 1962*, vol. II, pp. 63–66).

> reservation that has been formulated by another State. ... The Special Rapporteur, although also of the opinion that there is value in the Court's principle as a general concept, feels that there is a certain difficulty in using it as a *criterion* of a reserving State's status as a party to a treaty in combination with the objective criterion of the acceptance or rejection of the reservation by other States."[1590]

However, the same Special Rapporteur's endorsement of compatibility with the object and purpose of the treaty, not only as a criterion for the permissibility of reservations but also as a key element to be taken into account in interpretation,[1591] was swift.[1592]

(5) The criterion has considerable merit. Notwithstanding the inevitable "margin of subjectivity", which is limited, however, by the general principle of good faith, article 19, subparagraph (c), is undoubtedly a useful guideline capable of resolving in a reasonable manner most problems that arise.

(6) The *travaux préparatoires* on this provision are of little assistance in determining the meaning of the expression.[1593] As has been noted,[1594] the commentary to draft article 16, adopted in 1966 by the Commission, usually more prolix, is limited to a single paragraph and does not even allude to the difficulties involved in defining the object and purpose of the treaty, other than very indirectly, through a simple reference to draft article 17:[1595] "The admissibility or otherwise of a reservation under paragraph (c) ... is in every case very much a

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[1590] *Yearbook ... 1962*, vol. II, pp. 65–66, para. 10; along the same lines, see Waldock's oral statement, *ibid.*, vol. I, 651st meeting, 25 May 1962, p. 139, paras. 4–6; however, during the discussion the Special Rapporteur did not hesitate to characterize the principle of compatibility as a "test" (see p. 145, para. 85 – this paragraph also shows that, from the outset, in Waldock's mind, this test was decisive as far as the formulation of reservations was concerned (in contrast to objections, for which the consensual principle alone appeared practicable to him)). The wording used in draft article 17, paragraph 2 (a) as proposed by the Special Rapporteur reflects this uncertainty: "When formulating a reservation under the provisions of paragraph 1 (*a*) of this article [with respect to this provision, see the commentary to guideline 3.1.1, para. (3)], a State shall have regard to the compatibility of the reservation with the object and purpose of the treaty" (*ibid.*, vol. II, p. 60). This principle met with general approval during the Commission's debates in 1962 (see in particular Briggs (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 140, para. 23); Lachs (p. 142, para. 54); Rosenne (pp. 144–145, para. 79), who has no hesitation in speaking of a "test" (see also p. 145, para. 82, and 653rd meeting, 29 May 1962, p. 156, para. 27); Castrén (652nd meeting, p. 148, para. 25)) and in 1965 (Yasseen (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, pp. 149–150, para. 20); Tunkin (p. 150, para. 25); see, however, the objections by De Luna (652nd meeting, 28 May 1962, p. 148, para. 18, and 653rd meeting, p. 160, para. 67); Gros (652nd meeting, p. 150, paras. 47–51); Ago (653rd meeting, p. 157, para. 34); or, during the debate in 1965, those of Ruda (*ibid.*, 796th meeting, 4 June 1965, p. 147, para. 55, and 797th meeting, 8 June 1965, p. 154, para. 69); Ago (798th meeting, 9 June 1965, p. 161, para. 71)). To the end, Tsuruoka opposed subparagraph (c) and, for that reason, abstained in the voting on draft article 18 as a whole (adopted by 16 votes to none with one abstention on 2 July 1965 – *ibid.*, 816th meeting, p. 283, para. 42).

[1591] See article 31, paragraph 1, of the Vienna Convention.

[1592] See I. Buffard and K. Zemanek, footnote 1577 above, pp. 320–321.

[1593] See *ibid.*, pp. 319–321.

[1594] Catherine Redgwell, "The law of reservations in respect of multilateral conventions", in J.P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out – Reservations and Objections to Human Rights Conventions* (London, British Institute of International Comparative Law, 1997), p. 7.

[1595] Future article 20 of the Vienna Convention. The article in no way resolves the issue, which is left pending.

matter of the appreciation of the acceptability of the reservation by the other contracting States."[1596]

(7) The discussion of subparagraph (c) in the Commission[1597] and subsequently at the Vienna Conference[1598] does not shed any further light on the meaning of the expression "object and purpose of the treaty" for the purposes of this provision. Nor does international jurisprudence enable us to define it, even though it is in common use.[1599] There are, however, some helpful hints, particularly in the 1951 advisory opinion of the International Court of Justice on *Reservations to the Genocide Convention*.

(8) The expression seems to have been used for the first time in its current form[1600] in the advisory opinion of the Permanent Court of International Justice of 31 July 1930 in the *Greco-Bulgarian "Communities"* case.[1601] However, it was not until 1986 in the *Nicaragua* case[1602] that the Court put an end to what has been described as "terminological chaos",[1603] no doubt influenced by the Vienna Convention.[1604] It is difficult, however, to infer a great

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[1596] *Yearbook ... 1965*, vol. II, p. 207, para. 17. The commentary to the corresponding provision adopted in 1962 (art. 18, para. 1 (d)) is no more forthcoming (see *Yearbook ... 1962*, vol. II, p. 180, para. 15).

[1597] See footnote 1590 above.

[1598] It is significant that none of the amendments proposed to the Commission's draft article 16 — including the most radical ones — called this principle into question. At most, the amendments by Spain, the United States of America and Colombia proposed adding the concept of the "nature" of the treaty or substituting it for that of the object (see paragraph (6) of the commentary to guideline 3.1.1, footnote XXX).

[1599] See I. Buffard and K. Zemanek, footnote 1577 above, pp. 312–319, and footnotes 1600 and 1603 below.

[1600] I. Buffard and K. Zemanek note (*ibid.*, p. 315) that the expression "the aim and the scope" had already been used in the advisory opinion of the Permanent Court of International Justice of 23 July 1926 on *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer* in reference to Part XIII of the Treaty of Versailles, *P.C.I.J. Series B, No. 13*, p. 18. The same authors, after citing exhaustively the relevant decisions of the Court, describe the difficulty of establishing definitive terminology (especially in English) in the Court's case law (*ibid.*, pp. 315–316).

[1601] The terms are inverted, however: the Court bases itself on "the aim and object" of the Greco-Bulgarian Convention of 27 November 1919, *P.C.I.J. Series B, No. 17*, p. 21.

[1602] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, *I.C.J. Reports 1986*, pp. 136–137, paras. 271–273, p. 138, para. 275, or p. 140, para. 280.

[1603] I. Buffard and K. Zemanek, footnote 1577 above, p. 316.

[1604] Henceforth, the terminology used by the Court seems to have been firmly established; *cf.*: *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility*, Judgment of 20 December 1988, *I.C.J. Reports 1988*, p. 89, para. 46; *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment of 14 June 1993, *I.C.J. Reports 1993*, pp. 49–51, paras. 25–27; *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment of 3 February 1994, *I.C.J. Reports 1994*, pp. 25–26, para. 52; *Oil Platforms, Preliminary Objection*, Judgment of 12 December 1996, *I.C.J. Reports 1996*, p. 813, para. 27; *Gabčíkovo-Nagymaros Project*, Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 64, para. 104, and p. 67, para. 110; *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections*, Judgment of 11 June 1998, *I.C.J. Reports 1998*, p. 318, para. 98; *Kasikili/Sedudu Island*, Judgment of 13 December 1999, *I.C.J. Reports 1999*, pp. 1072–1073, para. 43; *LaGrand*, Judgment of 27 June 2001, *I.C.J. Reports 2001*, pp. 502–503, para. 102; *Sovereignty over Pulau Ligitan and Pulau Sipadan, Merits*, Judgment of 17 December 2002, *I.C.J. Reports 2002*, p. 652, para. 51; *Avena and Other Mexican Nationals*, Judgment of 31 March 2004, *I.C.J. Reports 2004*, p. 48, para. 85; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, *I.C.J. Reports* deal from this relatively abundant case law regarding the method to be followed for determining the object and purpose of a given treaty: the Court often proceeds by simple affirmations[1605] and, when it seeks to justify its position, it does so empirically.[1606]

(9) It has been asked whether, in order to get around the difficulties resulting from such uncertainty, there is a need to break down the concept of the "object and purpose of the treaty" by looking first at the object and then at the purpose. For example, during the discussion of draft article 55 concerning the rule *pacta sunt servanda*, Reuter emphasized that "the object of an obligation was one thing and its purpose was another".[1607] While the distinction is common in French (or francophone) legal literature,[1608] it meets with scepticism among authors trained in the German or English systems.[1609]

(10) However, one (French) author has shown convincingly that "the question cannot be settled" by reference to international jurisprudence,[1610] particularly since neither the object — defined as the actual content of the treaty[1611] — still less the purpose — the outcome sought[1612] — remain immutable over time, as the theory of emergent purpose advanced by Sir Gerald Fitzmaurice clearly demonstrates: "The notion of object and purpose is itself not a fixed and static one, but is liable to change, or rather develop as experience is gained in the operation and working of the convention."[1613] Thus, it is hardly surprising that the attempts

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2004, p. 179, para. 109; *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections*, Judgment of 15 December 2004, *I.C.J. Reports 2004*, p. 319, para. 102; *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility*, Judgment of 3 February 2006, paras. 66–67 and 77; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Merits*, Judgment of 26 February 2007, paras. 160 and 198; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, para. 79; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, paras. 85, 98, 143 and 281.

[1605] See, for example, *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, Advisory Opinion of 8 December 1927, *P.C.I.J., Series B, No. 14*, p. 64: "It is obvious that the object of the Treaty of Paris [of 1856] ... has been to assure freedom of navigation ..."; *International Status of South-West Africa*, Advisory Opinion of 11 July 1950, *I.C.J. Reports 1950*, pp. 136–137, and the following judgments cited in the previous note: Judgment of 14 June 1993, p. 50, para. 27; Judgment of 25 September 1997, p. 67, para. 110; Judgment of 11 June 1998, p. 318, para. 98; Judgment of 27 June 2001, p. 502, para. 102; and Judgment of 15 December 2004, para. 102.

[1606] See paragraph (3) of the commentary to guideline 3.1.5.1 below.

[1607] *Yearbook ... 1964*, vol. I, 19 May 1964, 726th meeting, p. 26, para. 77. Elsewhere, however, the same author manifests a certain scepticism regarding the utility of the distinction (see P. Reuter, "Solidarité ...", footnote 1118 above, p. 625 (also reproduced in P. Reuter, *Le développement* ..., footnote 405 above, p. 363)).

[1608] See I. Buffard and K. Zemanek, footnote 1577 above, pp. 325–327; see footnote 1607 above.

[1609] *Ibid.*, pp. 322–325 and 327–328.

[1610] G. Teboul, footnote 1583 above, p. 696.

[1611] See, for example, Jean-Paul Jacqué, *Éléments pour une théorie de l'acte juridique en droit international public* (Paris, L.G.D.J., 1972), p. 142: "L'objet d'un acte reside dans les droits et obligations auxquels il donne naissance" [The object of an instrument resides in the rights and obligations to which it gives rise].

[1612] *Ibid.*

[1613] Gerald G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Other Treaty Points", *British Year Book of International Law*, vol. 33 (1957), p. 208. See also G. Teboul, footnote 1583 above, p. 697, or William A. Schabas, "Reservations to the Convention on the Rights of the Child", *Human Rights Quarterly*, vol. 18 (1996), p. 479.

made in scholarly writing to define a general method for determining the object and purpose of the treaty have proved to be disappointing.[1614]

(11) As Ago argued during the debate in the Commission on draft article 17 (now article 19 of the Vienna Convention):

> "The question of the admissibility of reservations could only be determined by reference to the terms of the treaty as a whole. As a rule it was possible to draw a distinction between the essential clauses of a treaty, which normally did not admit of reservations, and the less important clauses, for which reservations were possible."[1615]

These are the two fundamental elements: the object and purpose can only be determined by an examination of the treaty as a whole;[1616] and, on that basis, reservations to the "essential"[1617] clauses, and only to such clauses, are rejected.

(12) In other words, it is the "*raison d'être*"[1618] of the treaty, its "*noyau fundamental*" [fundamental core][1619] that is to be preserved in order to avoid undermining the

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[1614] The most successful method, devised by I. Buffard and K. Zemanek, would involve a two-stage process: in the first stage, one would have "recourse to the title, preamble and, if available, programmatic articles of the treaty"; in the second stage, the conclusion thus reached *prima facie* would have to be tested in the light of the text of the treaty (footnote 1577 above, p. 333). However, the application of this apparently logical method (even though it reverses the order stipulated in article 31 of the Vienna Convention, under which the "terms of the treaty" are the starting point for any interpretation; see also the advisory opinion of the Inter-American Court of Human Rights of 8 September 1983 in *Restrictions to the Death Penalty*, OC-3/83, *Series A*, No. 3, para. 50) to concrete situations turns out to be rather unconvincing: the authors admit that they are unable to determine objectively and simply the object and purpose of four out of five treaties or groups of treaties used to illustrate their method (the Charter of the United Nations, the Vienna Convention on Diplomatic Relations, the Vienna Convention on the Law of Treaties, the general human rights conventions and the Convention on the Elimination of All Forms of Discrimination against Women, as well as the other human rights treaties dealing with specific rights; the method proposed proves convincing only in the latter instance (I. Buffard and K. Zemanek, footnote 1577 above, pp. 334–342)) and conclude that the concept indeed remains an "enigma" (see paragraph (3) above). Other scholarly attempts are scarcely more convincing, despite the fact that their authors are often categorical in defining the object and purpose of the treaty studied. Admittedly, they are often dealing with human rights treaties, which lend themselves easily to conclusions influenced by ideologically oriented positions, one symptom of which is the insistence that all the substantive provisions of such treaties reflect their object and purpose (which, taken to its logical extremes, is tantamount to precluding any reservation from being valid) – for a critique of this extreme view, see W.A. Schabas, "Reservations to the Convention on the Rights of the Child", footnote 1613 above, pp. 476–477, or "Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?", *Brooklyn Journal of International Law*, vol. 21 (1995), pp. 291–293. On the position of the Human Rights Committee, see paragraph (1) of the commentary to guideline 3.1.5.6. See also Bruno Simma and Gleider I. Hernandéz, "Legal Consequences of an Impermissible Reservation to a Human Rights Treaty, Where do We Stand?", in E. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (Oxford, Oxford University Press), 2011, pp. 70–71.

[1615] *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 141, para. 35.

[1616] What is entailed is to examine whether the reservation is compatible "with the general tenour" of the treaty (Bartoš, *ibid.*, p. 142, para. 40).

[1617] And not those that related "to detail only" (Paredes, *ibid.*, p. 146, para. 90).

[1618] *I.C.J. Reports 1951*, footnote 604 above, p. 21: "none of the contracting parties is entitled to frustrate or impair ... the purpose and *raison d'être* of the convention".

[1619] Statement by the representative of France to the Third Committee at the eleventh session of the General Assembly, 703rd meeting on 6 December 1956, quoted in A.C. Kiss, *Répertoire de la* "effectiveness"[1620] of the treaty as a whole. "It implies a distinction between all obligations in the treaty and the core obligations that are the treaty's *raison d'être*."[1621]

(13) Even if the general approach is fairly clear, it is no easy matter to reflect this in a simple formulation. The "threshold" may seem to have been set too high in guideline 3.1.5 and to facilitate unduly the formulation of reservations. By definition any reservation "purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application" to the author of the reservation;[1622] therefore, the definition of the object and purpose of the treaty should not be so broad as to impair the right to formulate reservations. By limiting the incompatibility of the reservation with the object and purpose of the treaty to cases in which (i) it impairs an essential element, (ii) necessary to the general tenour of the treaty, (iii) thereby compromising the *raison d'être* of the treaty, the formulation in guideline 3.1.5 strikes an acceptable balance between the need to preserve the integrity of the treaty and the concern to facilitate the broadest possible participation in multilateral conventions.[1623]

(14) Although a definition of each of these three inseparable elements is doubtless not possible, some clarification may be useful:

> (i) The term "essential element" is not necessarily limited to a specific provision. An "essential element" may be a norm, a right or an obligation which, interpreted in context,[1624] is essential to the general tenour of the treaty and whose exclusion or modification would compromise the treaty's *raison d'être*. That would generally be the case if a State sought to exclude or significantly modify a provision of the treaty which embodied the object and purpose of the treaty. Thus a reservation which excluded the application of a provision comparable to article I of the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran of 15 August 1955 would certainly impair an "essential element" within the meaning of guideline 3.1.5, given that this provision "must be regarded as fixing an objective, in the light of which the other treaty provisions are to be interpreted and applied";[1625]
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> (ii) This "essential element" must thus be "necessary to the general tenour of the treaty", that is the balance of rights and obligations which constitute its substance or the general concept underlying the treaty.[1626] While the Commission has had no

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pratique française en matière de droit international public (Paris, Centre national de la recherche scientifique, 1962), vol. I, p. 277, No. 552.

[1620] See European Court of Human Rights, *Loizidou*, Judgment of 23 March 1995, *(Preliminary Objections), Publications of the European Court of Human Rights, Series A*, vol. 310, p. 27, para. 75: acceptance of separate regimes of enforcement of the European Convention on Human Rights "would ... diminish the effectiveness of the convention as a constitutional instrument of European public order (*ordre public*)".

[1621] L. Lijnzaad, footnote 463 above, p. 83; see also p. 59; or L. Sucharipa-Behrmann, "The legal effects of reservations to multilateral treaties", *Austrian Review of International and European Law*, vol. 1 (1996), p. 76.

[1622] *Cf.* guideline 1.1, paragraph 1 *in fine*.

[1623] See A. Pellet and D. Müller, "From Bilateralism to Community Interest – Reservations to Human Rights Treaties: Not an Absolute Evil" in Ulrich Fastenrat (ed.), *From Bilateralism to Community Interest, Essays in Honour of Bruno Simma* (Oxford University Press, 2011), pp. 524–530.

[1624] See guideline 3.1.5.1.

[1625] International Court of Justice, *Oil Platforms*, Judgment of 12 December 1996, cited in footnote 1604 above, *I.C.J. Reports 1996*, p. 814, para. 28.

[1626] Since not all treaties are necessarily or entirely based on a balance of rights and obligations (see in particular those treaties relating to "integral obligations", including the human rights treaties) difficulty in adopting, in French, the term "*économie générale du traité*", which seems to accurately reflect the concept that the essential nature of the point to which the reservation applies must be assessed in the context of the treaty as a whole, it has been somewhat more hesitant as regards the English expression to be used. After having vacillated between "general framework", "general structure" and "overall structure", it appeared to the Commission that the expression "general tenour" had the merit of placing the emphasis on the global nature of the assessment to be made and of not imposing too rigid an interpretation. Thus the International Court of Justice has determined the object and purpose of a treaty by reference not only to its preamble, but also to its "structure", as represented by the provisions of the treaty taken as a whole;[1627]

(iii) Similarly, in an endeavour to avoid too high a "threshold", the Commission chose the adjective "necessary" in preference to the stronger term "indispensable", and decided on the verb "impair" (rather than "deprive") to apply to the "*raison d'être*" of the treaty, it being understood that it may be simple and unambiguous (the *raison d'être* of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide is clearly defined by its title) or much more complex (in the case of a convention entailing many interdependent rights and obligations, such as general human rights treaties[1628] or a convention on environmental protection or investments covering a broad range of issues) and that the question could even arise of whether the *raison d'être* might change over time.[1629]

(15) The fact remains that guideline 3.1.5 indicates a direction rather than establishing a clear criterion that can be directly applied in all cases. Accordingly, it seems appropriate to complement it in two ways: on the one hand, by seeking to specify means of determining the object and purpose of a treaty – as in guideline 3.1.5.1, and, on the other hand, by illustrating the methodology more clearly by means of a series of examples chosen from areas in which the question of the permissibility of reservations frequently arises (guidelines 3.1.5.2 to 3.1.5.7).

3.1.5.1 Determination of the object and purpose of the treaty

The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context, in particular the title and the preamble of the treaty. Recourse may also be had to the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties.

Commentary

(1) It is by no means easy to put together in a single formula all the elements to be taken into account, in each specific case, in determining the object and purpose of the treaty. Such a

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(see G.G. Fitzmaurice, second report on the law of treaties (A/CN.4/107), *Yearbook ... 1957*, vol. II, pp. 54–55, paras. 125–128).

[1627] International Court of Justice, *Oil Platforms*, Judgment of 12 December 1996, *I.C.J. Reports 1996*, p. 813, para. 27; *Sovereignty over Pulau Ligitan and Pulau Sipadan*, Judgment of 17 December 2002, *I.C.J. Reports 2002*, p. 652, para. 51.

[1628] See guideline 3.1.5.6 below. See also A. Pellet, "Article 19 (1969)", footnote 1454 above, pp. 745–746, paras. 202–203; Vienna Convention Article 19, footnote 1454 above, pp. 454–455, paras. 123–125.

[1629] See paragraph (10) above and paragraph (7) of the commentary to guideline 3.1.5.1 below.

process undoubtedly requires more "*esprit de finesse*" than "*esprit de géométrie*",[1630] like any act of interpretation, for that matter – and this process is certainly one of interpretation.

(2) Given the great variety of situations and their susceptibility to change over time,[1631] it would appear to be impossible to devise a single set of methods for determining the object and purpose of a treaty, and admittedly a certain amount of subjectivity is inevitable – however, that is not uncommon in law in general and in international law in particular.

(3) In this context, it may be observed that the International Court of Justice has deduced the object and purpose of a treaty from a number of highly disparate elements, taken individually or in combination:

- From its title;[1632]
- From its preamble;[1633]
- From an article placed at the beginning of the treaty that "must be regarded as fixing an objective, in the light of which the other treaty provisions are to be interpreted and applied";[1634]
- From an article of the treaty that demonstrates "the major concern of each contracting party" when it concluded the treaty;[1635]
- From the preparatory work on the treaty;[1636] and

[1630] Blaise Pascal, *Pensées*, in *Oeuvres complètes* (Paris, Bibliothèque de la Pléiade, N.R.F.-Gallimard, 1954), p. 1091.

[1631] See above paragraph (10) of the commentary to guideline 3.1.5. The question could also be raised whether the cumulative weight of separate reservations, each of which, taken alone, would be admissible, might not ultimately result in their incompatibility with the object and purpose of the treaty (see Belinda Clark, "The Vienna Convention reservations regime and the Convention on Discrimination Against Women", *American Journal of International Law*, vol. 85 (1991), p. 314; or Rebecca J. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women", *Virginia Journal of International Law*, vol. 30 (1990), pp. 706 and 707).

[1632] See *Certain Norwegian Loans*, Judgment of 6 July 1957, *I.C.J. Reports 1957*, p. 24; but see *Military and Paramilitary Activities in and against Nicaragua, Merits*, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 137, para. 273, and *Oil Platforms, Preliminary Objection*, Judgment of 12 December 1996, *I.C.J. Reports 1996*, p. 814, para. 28.

[1633] See the advisory opinion of the Permanent Court of International Justice of 31 July 1930 on *Greco-Bulgarian "Communities"*, *P.C.I.J., Series B*, No. 17, p. 19; or *Rights of Nationals of the United States of America in Morocco*, Judgment of 27 August 1952, *I.C.J. Reports 1952*, p. 196; *Military and Paramilitary Activities in and against Nicaragua, Merits*, Judgment of 27 June 1986, cited in footnote XXX above, *I.C.J. Reports 1986*, p. 138, para. 275; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 3 February 1994, *I.C.J. Reports 1994*, pp. 25 and 26, para. 52; and *Sovereignty over Pulau Ligitan and Pulau Sipadan, Merits*, Judgment of 17 December 2002, *I.C.J. Reports 2002*, p. 652, para. 51; see also the dissenting opinion of Judge Anzilotti appended to *Interpretation of the 1919 Convention Concerning Employment of Women During the Night*, Advisory Opinion of 15 November 1932, *P.C.I.J., Series A/B*, No. 50, p. 384.

[1634] *Oil Platforms*, Judgment of 12 December 1996, *I.C.J. Reports 1996*, p. 814, para. 28.

[1635] *Kasikili/Sedudu Island*, Judgment of 13 December 1999, *I.C.J. Reports 1999*, pp. 1072 and 1073, para. 43.

[1636] Often, as a way of confirming an interpretation based on the text itself; see the judgment of 3 February 1994 cited in footnote 1633 above, pp. 27 and 28, paras. 55 and 56, the judgment of 13 December 1999 cited in footnote 1635 above, p. 1074, para. 46, or *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, cited in footnote 1604 above, *I.C.J. Reports 2004*, p. 179, para. 109; see also the

- From its overall tenour.[1637]

(4) It is difficult, however, to regard this as a "method" properly speaking: these disparate elements are taken into consideration, sometimes separately, sometimes together, and the Court forms a "general impression", in which subjectivity inevitably plays a considerable part.[1638] Since, however, the basic problem is one of interpretation, it would appear to be legitimate, *mutatis mutandis*, to transpose the principles in articles 31 and 32 of the Vienna Conventions applicable to the interpretation of treaties — the "general rule of interpretation" set forth in article 31 and the "supplementary means of interpretation" set forth in article 32[1639] — and to adapt them to the determination of the object and purpose of the treaty.

(5) The Commission is fully aware that this position is to some extent tautological,[1640] since paragraph 1 of article 31 reads:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose.*"

(6) That said, however, the determination of the object and purpose of a treaty is indeed a question of interpretation, whereby the treaty must be interpreted as a whole, in good faith, in its entirety, in accordance with the ordinary meaning to be given to the terms of the treaty in their context, including the preamble, taking into account the preparatory work of the treaty and the "circumstances of its conclusion"[1641] and, where appropriate, the subsequent practice of the parties.[1642]

(7) These are the parameters underlying guideline 3.1.5.1, which partly reproduces the terms of articles 31 and 32 of the Vienna Conventions in that it highlights the need for determination in good faith based on the terms of the treaty in their context. Although the Commission adhered closely to the wording of article 31, paragraph 2, of the Vienna Conventions, which list the elements constituting the context to be taken into consideration for the purpose of interpreting the treaty, it thought that it was worthwhile to stress two specific elements, namely, the preamble, mentioned in article 31, paragraph 2 — and the title of the

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dissenting opinion of Judge Anzilotti cited in footnote XXX above, pp. 388 and 389. In its advisory opinion of 28 May 1951, the Court gives some weight to the "origins" of the Convention on the Prevention and Punishment of the Crime of Genocide (*I.C.J. Reports 1951*, footnote 604 above, p. 23).

[1637] See Permanent Court of International Justice, *Competence ..., Advisory Opinion of 23 July 1930, P.C.I.J., Series B*, No. 13, p. 18, and the P.C.I.J. advisory opinion of 31 July 1930, cited in footnote 1633 above, p. 20; or the judgments of the International Court of Justice of 12 December 1996, cited in footnote 1631 above, p. 813, para. 27 and of 17 December 2002, cited in footnote 1933 above, p. 652, para. 51.

[1638] "One could just as well believe it was simply by intuition" (I. Buffard and K. Zemanek, footnote 1577 above, p. 319).

[1639] See the advisory opinion of 8 September 1983 of the Inter-American Court of Human Rights on *Restrictions to the death penalty*, OC-3/83, *Series A*, No. 3, para. 63; see also L. Sucharipa-Behrmann, footnote 1621 above, p. 76. While showing that it was aware that the rules on interpretation of treaties could not be directly transposed to unilateral statements formulated by the parties concerning a treaty (reservations and interpretative declarations), the International Law Commission recognizes that those rules constitute useful guidelines in that regard (see guideline 1.3.1, "Method of determining the distinction between reservations and interpretative declarations", and commentary). This is true *a fortiori* when the aim is to assess the compatibility of a reservation with the object and purpose *of the treaty* itself.

[1640] See W.A. Schabas, footnote 969 above, p. 48.

[1641] Article 32.

[1642] *Cf.* article 31, paragraph 3.

treaty, which is of particular importance in determining the object and purpose.[1643] Reference to the preparatory work and the circumstances of the treaty's conclusion is also certainly of greater importance for the determination of the object and purpose of the treaty than for the interpretation of one of its provisions. The phrase "the subsequent practice agreed upon by the parties" reflects paragraphs 2, 3 (a) and 3 (b) of article 31, since the Commission was of the view that the object and purpose of a treaty was likely to evolve over time.[1644] Furthermore, even though the reference to subsequent practice might seem superfluous, since objections, if any, must be made during the year following the formulation of the reservation, it could nonetheless be pertinent, since assessment of the reservation by a third party might come at any time, even years after its formulation.

(8) In some cases, the application of these methodological guidelines raises no problems. It is obvious that a reservation to the Convention on the Prevention and Punishment of the Crime of Genocide by which a State sought to reserve the right to commit some of the prohibited acts in its territory or in certain parts thereof would be incompatible with the object and purpose of the Convention.[1645]

(9) Germany and a number of other European countries presented the following arguments in support of their objections to a reservation formulated by Viet Nam to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances:

> "The reservation made in respect of article 6 is contrary to the principle 'aut dedere aut judicare' which provides that offences are brought before the court or that extradition is granted to the requesting States.
>
> "The Government of the Federal Republic of Germany is therefore of the opinion that the reservation jeopardizes the intention of the Convention, as stated in article 2, paragraph 1, to promote cooperation among the parties so that they may address more effectively the international dimension of illicit drug trafficking.
>
> "The reservation may also raise doubts as to the commitment of the Government of the Socialist Republic of Viet Nam to comply with fundamental provisions of the Convention."[1646]

[1643] The mention of "the terms of the treaty" seemed sufficient in determining the general objectives of the treaty; but they could, however, have a particular importance in assessing the "general tenour" of the treaty (see footnote 1614 above).

[1644] See paragraph (10) of the commentary to guideline 3.1.5 below and paragraph (2) above.

[1645] The question arises in particular with regard to the scope of the "colonial clause" in article XII of the Convention, a clause contested by the Soviet bloc countries, which had made reservations to it (see *Multilateral Treaties* ..., chap. IV.1); but the focus here is on the permissibility of that quasi-reservation clause.

[1646] *Ibid.*, chap. VI.19; in the same vein see also the objections of Belgium, Denmark, Greece, Ireland, Italy, the Netherlands, Portugal, Spain, Sweden and the United Kingdom, and the less explicitly justified objections of Austria and France, *ibid.* See also the objection of Norway, and the less explicit objections of Germany and Sweden to the Tunisian declaration concerning the application of the 1961 Convention relating to the Reduction of Statelessness, *ibid.*, Chap. V.4. Another significant example is provided by the declaration of Pakistan concerning the 1997 International Convention for the Suppression of Terrorist Bombings, which excluded from the application of the Convention "struggles, including armed struggle, for the realization of the right of self-determination launched against any alien or foreign occupation or domination, in accordance with the rules of international law", *ibid.*, chap. XVIII.9. A number of States considered that "declaration" to be contrary to the object and purpose of the Convention, which is "the suppression of terrorist bombings, irrespective of where they take place and of who carries them out"; see the objections of Australia, Austria, Canada, Denmark, Finland, France,

(10) It can also happen that the prohibited reservation relates to less central provisions but is nonetheless contrary to the object and purpose of the treaty because it makes its implementation impossible. That is the rationale behind the wariness the Vienna Convention displays towards reservations to constituent instruments of international organizations.[1647] For example, the German Democratic Republic, when ratifying the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, declared that it would only bear its share of the expenses of the Committee against Torture for activities for which it recognized that the Committee had competence.[1648] Luxembourg objected to that "declaration" (which was actually a reservation), arguing that the effect would be "to inhibit activities of the Committee in a manner incompatible with the purpose and the goal of the Convention".[1649]

(11) It is clearly impossible to draw up an exhaustive list of the potential problems that may arise concerning the compatibility of a reservation with the object and purpose of the treaty. It is also clear, however, that reservations to certain categories of treaties or treaty provisions or reservations having certain specific characteristics pose particular problems of permissibility that should be examined, one by one, in an attempt to develop guidelines that would be helpful to States in formulating or responding to reservations of that kind in a fully informed manner. This is the intent of guidelines 3.1.5.2 to 3.1.5.7, the preparation of which was prompted by the relative frequency with which problems arise; these guidelines are of a purely illustrative nature.

3.1.5.2 Vague or general reservations

A reservation shall be worded in such a way as to allow its meaning to be understood, in order to assess in particular its compatibility with the object and purpose of the treaty.

Commentary

(1) Since, under article 19 (c) of the Vienna Conventions, reproduced in guideline 3.1, a reservation must be compatible with the object and purpose of the treaty, and since other States are required, under article 20, to take a position on this compatibility, it must be possible for them to do so. This will not be the case if the reservation in question is worded in such a way as to preclude any determination of its scope, in other words, if it is vague or general, as indicated in the title of guideline 3.1.5.2. This is not, strictly speaking, a case in which the reservation is incompatible with the object and purpose of the treaty: it is rather a hypothetical situation in which it is impossible to assess this compatibility. This shortcoming

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Germany, India, Italy, Japan (with a particularly clear statement of reasons), the Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom and the United States of America, *ibid.* Similarly, Finland justified its objection to the reservation made by Yemen to article 5 of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination by the argument that "provisions prohibiting racial discrimination in the granting of such fundamental political rights and civil liberties as the right to participate in public life, to marry and choose a spouse, to inherit and to enjoy freedom of thought, conscience and religion are central in a convention against racial discrimination", *ibid.*, chap. IV.2.

[1647] *Cf.* article 20, paragraph 3: "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization." The text of the provision is reproduced in guideline 2.8.8.

[1648] See *Multilateral Treaties* ..., chap. IV.9; see also R.W. Edwards, footnote 59 above, pp. 391–393 and 400.

[1649] *Multilateral Treaties* ..., chap. IV.9. Fifteen other States raised objections on the same grounds.

seemed sufficiently serious to the Commission for it to come up with particularly strong wording: "shall be worded" rather than "should be worded" or "is worded". Furthermore, use of the term "worded" highlights the fact that this is a requirement of substance and not merely one of form.

(2) In any event, the requirement for precision in the wording of reservations is implicit in their very definition. It is clear from article 2, paragraph 1 (d), of the Vienna Conventions, from which the text in guideline 1.1 of the Guide to Practice is taken, that the object of reservations is to exclude or to modify "the legal effect of certain provisions of the treaty in their application" to their authors.[1650] Thus, it cannot be maintained that the effect of reservations could possibly be to prevent a treaty as a whole from producing its effects. And, although "across-the-board" reservations are common practice, they are, as specified in guideline 1.1.1, paragraph 2,[1651] valid only if they purport "to exclude or modify the legal effect ... of the treaty as a whole *with respect to certain specific aspects* ...".

(3) Furthermore, it follows from the inherently consensual nature of the law of treaties in general,[1652] and the law of reservations in particular,[1653] that, although States are free to formulate (not to *make*[1654]) reservations, the other parties must be entitled to react by accepting the reservation or objecting to it. That is not the case if the text of the reservation does not allow its meaning to be understood.

(4) That often happens when a reservation invokes the internal law of the State that has formulated it without identifying the provisions in question or specifying whether they are to be found in its constitution or its civil or criminal code. In such cases, it is not the reference to

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[1650] See the comments of the Israeli Government on the Commission's first draft on the law of treaties, which caused the English text of the definition of reservations to be brought into line with the French text by changing the word "some" to "certain" (in Sir Humphrey Waldock, fourth report (A/CN.4/177), *Yearbook ... 1965*, vol. II, p. 15); see also Chile's statement at the United Nations Conference on the Law of Treaties, *First Session, Summary records*, footnote 35 above, 4th plenary meeting, p. 21, para. 5: "the words 'to vary the legal effect of certain provisions of the treaty' (subparagraph (d)) meant that the reservation must state clearly what provisions it related to. Imprecise reservations must be avoided."

[1651] See paragraphs (16) to (22) of the commentary to guideline 1.1. See also the remarks by R. Riquelme Cortado, footnote 150 above, p. 172; or A. Pellet, "Article 19 (1969)", footnote 1454 above, pp. 747–752, paras. 206–211; A. Pellet, 1969 Vienna Convention Article 19, footnote 1454 above, pp. 457–460, paras. 129–135.

[1652] See P. Reuter, footnote 28 above, pp. 20–21; C. Tomuschat, footnote 1084 above, p. 466. See also, for example, the Permanent Court of International Justice, *S.S. "Wimbledon"*, Judgment of 17 August 1923, *P.C.I.J. Series A*, No. 1, p. 25, or the International Court of Justice, *International Status of South-West Africa*, Advisory Opinion of 11 July 1950, *I.C.J. Reports 1950*, p. 139.

[1653] The International Court of Justice specified in this connection in its advisory opinion of 1951 on *Reservations to the Convention on Genocide* that "it is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto" (*I.C.J. Reports 1951*, footnote 604 above, p. 21). The authors of the joint dissenting opinion accompanying the advisory opinion express this idea still more strongly: "The consent of the parties is the basis of treaty obligations. The law governing reservations is only a particular application of this fundamental principle, whether the consent of the parties to a reservation is given in advance of the proposal of the reservation or at the same time or later" (p. 32). See also the arbitral award of 30 June 1977 in the case concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, *UNRIAA*, vol. XVIII, pp. 41 and 42, paras. 60 and 61; and W. Bishop, footnote 288 above, p. 255, note 96.

[1654] See paragraph (6) of the commentary to guideline 3.1.

the domestic law of the reserving State *per se* that is the problem,[1655] but rather the frequent vagueness and generality of the reservations referring to domestic law, which make it impossible for the other States parties to take a position on them. That was the thinking behind an amendment submitted by Peru at the Vienna Conference seeking to add the following subparagraph (d) to future article 19 of the Convention:

> "(d) The reservation renders the treaty inoperative by making its application subject, in a general and indeterminate manner, to national law."[1656]

(5) Finland's objections to the reservations of several States parties to the 1989 Convention on the Rights of the Child would certainly be on firmer ground with that argument than by a reference to article 27 of the 1969 Vienna Convention;[1657] in fact, in response to the reservation by Malaysia, which had accepted a number of the provisions of the 1989 Convention "only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia",[1658] Finland considered that the "broad nature" of that reservation left open "to what extent Malaysia commits itself to the Convention and to the fulfilment of its obligations under the Convention".[1659] Thailand's interpretative declaration to the effect that it "does not interpret and apply the provisions of this Convention [the 1966 International Convention on the Elimination of All Forms of Racial Discrimination] as imposing upon the Kingdom of Thailand any obligation beyond the confines of [its] Constitution and [its] laws"[1660] also prompted an objection on the part of Sweden that, in so doing, Thailand was making the application of the Convention subject to a general reservation which made reference to the limits of national legislation the content of which was not specified.[1661]

[1655] See paragraph (4) of the commentary to guideline 3.1.5.5.

[1656] Reports of the Committee of the Whole (A/CONF.39/14), in *Documents of the Conference*, footnote 54 above, p. 134, para. 177; see the explanations of the representative of Peru at the 21st plenary meeting of the Conference, on 10 April 1968, *First Session, Summary records*, A/CONF.39/11, footnote 35 above, p. 109, para. 25. The amendment was rejected by 44 votes to 16 with 26 abstentions (*ibid.*, 25th plenary meeting of 16 April 1968, p. 135, para. 26); a reading of the debate gives little explanation for the rejection: no doubt a number of delegations, like Italy, considered it "unnecessary to state that case expressly, since it was a case of reservations incompatible with the object of the treaty" (*ibid.*, 22nd plenary meeting, 10 April 1968, p. 120, para. 75); along these same lines, see Renata Szafarz, footnote 27 above, p. 302.

[1657] See paragraph (4) of the commentary to guideline 3.1.5.5. Similarly, the reason given by the Netherlands and the United Kingdom in support of their objections to the second United States reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, namely, that it created "uncertainty as to the extent of the obligations which the Government of the United States of America is prepared to assume with regard to the Convention" (*Multilateral Treaties* ... chap. IV.1) is more convincing than the argument based on an invocation of domestic law (see paragraph (4) (footnotes 1755 and 1756) of the commentary to guideline 3.1.5.5).

[1658] *Multilateral treaties* ... chap. IV.11.

[1659] *Ibid.* See also the objections by Finland and several other States parties to comparable reservations by several other States, *ibid.*

[1660] *Ibid.*, chap. IV.2.

[1661] *Ibid.* See along the same lines the Norwegian and Swedish objections of 15 March 1999 with regard to Bangladesh's reservation to the Convention on the Political Rights of Women of 31 March 1953 (*ibid.*, chap. XVI.1) or the objections by Finland to a reservation formulated by Guatemala to the 1969 Vienna Convention on the Law of Treaties and by the Netherlands, Sweden and Austria to a comparable reservation formulated by Peru to the same Convention (*ibid.*, chap. XXIII.1). See also the objection by Poland to the reservation formulated by Pakistan to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment: "The Islamic Republic of Pakistan refers in the above-mentioned reservations

(6) The same applies when a State reserves the general right to have its constitution prevail over a treaty,[1662] as for instance in the reservation by the United States of America to the Convention on the Prevention and Punishment of the Crime of Genocide:

> "... nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."[1663]

(7) Some of the so-called "sharia reservations"[1664] give rise to the same objection, a case in point being the reservation by which Mauritania approved the 1979 Convention on the Elimination of All Forms of Discrimination against Women "in each and every one of its parts which are not contrary to Islamic sharia".[1665] Here again, the problem lies not in the fact that Mauritania is invoking a law of religious origin which it applies,[1666] but, rather that, as Denmark noted, "the general reservations with reference to the provisions of Islamic law are of unlimited scope and undefined character".[1667] Thus, as the United Kingdom put it, such a reservation "which consists of a general reference to national law without specifying its

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to the Sharia laws and to its domestic legislation as possibly affecting the application of the Convention. Nonetheless it does [not] specify the exact content of these laws and legislation. As a result, it is impossible to clearly define the extent to which the reserving State has accepted the obligations of the Convention." (*ibid.*, chap. IV.9).

[1662] *Cf.* Pakistan's reservation to the Convention on the Elimination of All Forms of Discrimination against Women (*ibid.*, chap. IV.8), and the objections made by Austria, Finland, Germany, the Netherlands and Norway (*ibid.*) and by Portugal (*ibid.*).

[1663] *Ibid.*, chap. IV.1.

[1664] For a discussion of the various schools of thought, see in particular Andrea Sassi, "General Reservations to Multilateral Treaties" in Tullio Treves (ed.), "Six studies on reservations", *Comunicazioni e Studi*, vol. XXII (2002), pp. 96–99. With regard specifically to the application of the reservation to the 1979 Convention on the Elimination of All Forms of Discrimination against Women, see B. Clark, footnote 1631 above, pp. 299–302 and pp. 310–311; Jane Connors, "The Women's Convention in the Muslim world" in J.P. Gardner (ed.), *Human Rights as General Norms* ..., footnote 1594 above, pp. 85–103; R.J. Cook, footnote 1631 above, pp. 690–692; Jeremy McBride, "Reservations and the Capacity of States to Implement Human Rights Treaties" in J.P. Gardner (ed.), *loc. cit.*, pp. 149–156 (with a great many examples); or Yogesh Tyagi, "The Conflict of Law and Policy on Reservations to Human Rights Treaties", *BYBIL*, vol. 71 (2000), pp. 198–201 and, more specifically: Anna Jenefsky, "Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discrimination against Women", *Maryland Journal of International Law and Trade*, vol. 15 (1991), pp. 199–233.

[1665] *Multilateral Treaties* ..., chap. IV.8. See also the reservations by Saudi Arabia (citing "the norms of Islamic law" – *ibid.*) and by Malaysia (*ibid.*), or the reservation made by Maldives upon accession: "The Government of the Republic of Maldives will comply with the provisions of the Convention, except those which the Government may consider contradictory to the principles of the Islamic sharia upon which the laws and traditions of the Maldives is founded" (*ibid.*); the latter reservation having elicited several objections, the Maldives Government modified it in a more restrictive sense, but Germany once again objected to it and Finland criticized the new reservation (*ibid.*). Likewise, several States formulated objections to the reservation by Saudi Arabia to the International Convention on the Elimination of All Forms of Racial Discrimination of 1966, which made the application of its provisions subject to the condition that "these do not conflict with the precepts of the Islamic sharia" (*ibid.*, chap. IV.2).

[1666] The Holy See ratified the 1989 Convention on the Rights of the Child provided that "the application of the Convention be compatible in practice with the particular nature of the Vatican City State and of the sources of its objective law ..." (*ibid.*, chap. IV.11). As has been pointed out (W.A. Schabas, footnote 1613 above, pp. 478–479), this text raises, *mutatis mutandis*, the same problems as the "sharia reservation".

[1667] *Multilateral treaties* ..., chap. IV.8.

contents does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention".[1668]

(8) Basically, it is the impossibility of assessing the compatibility of such reservations with the object and purpose of the treaty, and not the certainty that they are incompatible, which makes them fall within the purview of article 19 (c) of the Vienna Convention on the Law of Treaties. As the Human Rights Committee pointed out:

> "Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto."[1669]

(9) According to article 57 (formerly article 64) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), "[r]eservations of a general character shall not be permitted ...". The European Court of Human Rights, in the *Belilos* case, declared invalid the interpretative declaration (equivalent to a reservation) by Switzerland on article 6, paragraph 1, of the European Convention because it was "couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope".[1670] But it is unquestionably the European Commission on Human Rights that most clearly formulated the principle applicable here when it judged that "a reservation is of a general nature ... when it is worded in such a way that it does not allow its scope to be determined".[1671]

(10) Guideline 3.1.5.2 reflects this fundamental notion. Its title gives an indication of the (alternative) characteristics which a reservation needs to exhibit to fall within its scope: it applies to reservations which are either "vague" or "general". An example of the former might be a reservation which leaves some uncertainty as to the circumstances in which it might be applicable[1672] or to the extent of the obligations effectively entered into by its author. The latter type would correspond to the examples given above.[1673]

[1668] *Ibid.* See also the objections by Austria, Finland, Germany, Norway, the Netherlands, Portugal and Sweden (*ibid.*). The reservations of some Islamic States to specific provisions of the Convention, on the grounds of their incompatibility with the sharia, are certainly less open to criticism on that basis, although a number of them also drew objections from some States. For example, whereas Clark, footnote 1631 above, p. 300, observes that Iraq's reservation to article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, based on the sharia, is specific and entails a regime more favourable than that of the Convention, this reservation nonetheless elicited the objections of Mexico, the Netherlands and Sweden, *Multilateral Treaties* ..., chap. IV.8.

[1669] General comment No. 24, CCPR/C/21/Rev.1/Add.6, 11 November 1994, para. 19; see also paragraph 12, which links the issue of the invocation of domestic law to that of "widely formulated reservations".

[1670] Judgement of 29 April 1988, *Belilos, ECHR Series A*, vol. 132, p. 25, para. 55 – see paragraph (8) of the commentary to guideline 3.1.2. For a detailed analysis of the generality condition posed by article 57 of the Convention, see especially I. Cameron and F. Horn, footnote 205 above, pp. 97–109, and R.St.J. MacDonald "Reservations under the European Convention on Human Rights", *Revue Belge de Droit International*, vol. 21 (1988), pp. 433–438 and 443–448.

[1671] Report of the Commission, 5 May 1982, *Temeltasch* case, Application No. 9116/80, *European Commission of Human Rights Yearbook*, vol. 25, para. 588. See P.-H. Imbert, footnote 25 above, pp. 599–607.

[1672] *Cf.* Malta's reservation to the International Covenant on Civil and Political Rights of 1966: "While the Government of Malta accepts the principle of compensation for wrongful imprisonment, it is not possible at this time to implement such a principle in accordance with

(11) Although the present commentary may not be the right place for a discussion of the effects of vague or general reservations,[1674] it must still be noted that they raise particular problems. It would seem difficult, *a priori*, to maintain that they are invalid *ipso jure*: the main criticism that can be levelled against them is that they make it impossible to assess whether or not they satisfy the conditions for permissibility.[1675] For that reason, they should lend themselves particularly well to a "reservations dialogue".

3.1.5.3 Reservations to a provision reflecting a customary rule

The fact that a treaty provision reflects a rule of customary international law does not in itself constitute an obstacle to the formulation of a reservation to that provision.

Commentary

(1) Guideline 3.1.5.3 relates to a problem which arises fairly often in practice: that of the permissibility of a reservation to a treaty provision which simply reflects a rule of customary international law – the word "reflect" is preferred here to "enunciate" in order to stress that the process of enshrining the rule in question in a treaty has no effect on its continued operation as a customary rule. Guideline 3.1.5.3 therefore sets out the principle that a reservation to a treaty rule which reflects a customary rule is not *ipso jure* incompatible with the object and purpose of the treaty, even if due account must be taken of that element in assessing such compatibility.

(2) On occasion States parties to a treaty have objected to reservations and challenged their compatibility with its object and purpose on the pretext that they were contrary to well-established customary rules. Thus, Austria declared, in cautious terms, that it was

> "... of the view that the Guatemalan reservations [to the 1969 Vienna Convention on the Law of Treaties] refer almost exclusively to general rules of [the said Convention] many of which are solidly based on international customary law. The reservations could call into question well-established and universally accepted norms. Austria is of the view that the reservations also raise doubts as to their compatibility with the object and purpose of the [said Convention] ...".[1676]

The Netherlands objected to the reservations formulated by several States in respect of various provisions of the 1961 Vienna Convention on Diplomatic Relations and took "the view that this provision remains in force in relations between it and the said States in accordance with international customary law".[1677]

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article 14, paragraph 6, of the Covenant" (*Multilateral Treaties* ..., chap. IV.4).

[1673] See paragraphs (5)–(9) above.

[1674] On the effects of reservations in general, see Part 4 of the Guide to Practice.

[1675] See paragraphs (1) or (4) above.

[1676] *Multilateral Treaties* ..., chap. XXIII.1; see also the objections formulated in similar terms by Belgium, Denmark, Finland, Germany, Sweden and the United Kingdom (*ibid.*). In the arbitration concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, the United Kingdom maintained that France's reservation to article 6 of the Convention on the Continental Shelf was aimed at "the rules of customary international law" and was "inadmissible as a reservation to article 6", decision of 30 June 1977, *UNRIAA*, vol. XVIII, p. 38, para. 50.

[1677] *Multilateral Treaties* ..., chap. III.3; strictly speaking, it is not the provisions in question that remain in force, but rather the rules of customary law that they express (see guideline 4.4.2 (Absence of effect on rights and obligations under customary international law)). See also

(3) It has often been thought that this inability to formulate reservations to treaty provisions which codify customary rules could be deduced from the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases:[1678]

> "... speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; – whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour".[1679]

(4) While the wording adopted by the Court is certainly not the most felicitous, the conclusion that some have drawn from it seems incorrect if this passage is put back into its context. The Court, in fact, is quite circumspect about the deductions called for by the exclusion of certain reservations. Noting that the faculty to formulate reservations to article 6 (on delimitation) of the 1958 Geneva Convention on the Continental Shelf was not excluded by article 12 on reservations,[1680] as it was in the case of articles 1 to 3, the Court considered it a normal and

> "legitimate inference that it was considered to have a different and less fundamental status and not, like those articles, to reflect pre-existing or emergent customary law".[1681]

(5) Thus, it is not true that the Court affirmed the inadmissibility of reservations in respect of customary law;[1682] it simply stated that, in the case under consideration, the different treatment which the authors of the Convention accorded to articles 1–3, on the one hand, and article 6, on the other, suggested that they did not consider that the latter codified a customary rule which, moreover, confirms the Court's own conclusion.

(6) Furthermore, the judgment itself states, in an often-neglected dictum, that "no reservation could release the reserving party from obligations of general maritime law existing

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Poland's objections to the reservations of Bahrain and the Libyan Arab Jamahiriya (*ibid.*) and D.W. Greig, footnote 28 above, p. 88.

[1678] See the dissenting opinion of Judge Morelli, appended to the 1969 judgment (*I.C.J. Reports 1969*, pp. 198 and 199) and the many commentaries cited in P.-H. Imbert, footnote 25 above, p. 244, note 20; see also G. Teboul, footnote 1583 above, p. 685.

[1679] Judgment of 20 February 1969, *I.C.J. Reports 1969*, pp. 38–39, para. 63.

[1680] See paragraph (5) of the commentary to guideline 3.1.2.

[1681] *I.C.J. Reports 1969*, p. 40, para. 66; see also p. 39, para. 63. In support of this position, see the individual opinion of Judge Padilla Nervo, *ibid.*, p. 89; *contra*, see the dissenting opinion of Judge Koretsky, *ibid.*, p. 163.

[1682] P.-H. Imbert, footnote 25 above, p. 244, note 22, and, in the same vein, Alain Pellet, "La C.I.J. et les réserves aux traités: remarques cursives sur une révolution inachevée", *Liber Amicorum Judge Shigeru Oda* (The Hague, Kluwer Law International, 2002), pp. 507–508. In his dissenting opinion, Judge Tanaka takes the opposing position with respect to "the application of the provision for settlement by agreement, since this is required by general international law, notwithstanding the fact that article 12 of the Convention does not expressly exclude article 6, paragraphs 1 and 2, from the exercise of the reservation faculty" (*I.C.J. Reports 1969*, p. 182); this confuses the question of the faculty to make a reservation with that of the reservation's effects, where the provision that the reservation concerns is of a customary, and even a peremptory, nature. (Strangely, Judge Tanaka considers that the equidistance principle "must be recognized as *jus cogens*" – *ibid.*).

outside and independently of the Convention [on the Continental Shelf] ...".[1683] Judge Morelli, dissenting, does not contradict this when he writes: "Naturally the power to make reservations affects only the contractual obligation flowing from the Convention ... It goes without saying that a reservation has nothing to do with the customary rule as such. If that rule exists, it exists also for the State which formulated the reservation, in the same way as it exists for those States which have not ratified."[1684] This clearly implies that the customary nature of the rule reflected in a treaty provision in respect of which a reservation is formulated does not in itself constitute grounds for invalidating the reservation: "the faculty of making reservations to a treaty provision has no necessary connection with the question whether or not the provision can be considered as expressing a generally recognized rule of law".[1685]

(7) Moreover, although this principle is sometimes challenged,[1686] it is recognized in the preponderance of the literature,[1687] and rightly so:

- Customary rules are binding on States, independently of their expression of consent to a treaty rule[1688] but, unlike the case of peremptory norms, States may opt out by agreement *inter se*; it is not clear why they could not do so through a reservation[1689] — providing that the latter is permissible — but this is precisely the question at hand;
- A reservation concerns only the expression of the rule in the context of the treaty, not its existence as a customary rule, even if, in some cases, it may cast doubt on the rule's general acceptance "as law";[1690] as the United Kingdom remarked in its observations on general comment No. 24 of the Human Rights Committee, "there is a clear distinction between choosing not to enter into treaty obligations and trying to opt out of customary international law";[1691]

[1683] *I.C.J. Reports 1969*, p. 40, para. 65.

[1684] *Ibid.*, p. 198.

[1685] Dissenting opinion of *ad hoc* Judge Sørensen, *ibid.*, p. 248.

[1686] See the position taken by Briggs in the declaration which he attached to the arbitral award of 30 June 1977 in the case concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, *UNRIAA*, vol. XVIII, pp. 123–124.

[1687] See M. Coccia, footnote 196 above, pp. 31–32; Giorgio Gaja, "Le riserve al Patto sui diritti civili e politici e il diritto consuetudinario", *Rivista di diritto internazionale*, vol. 79 (1996), pp. 451 and 452; P.-H. Imbert, footnote 1019 above, p. 48; R. Riquelme Cortado, footnote XXX above, pp. 159–171; and L. Sucharipa-Behrmann, footnote 1621 above, pp. 76 and 77.

[1688] *Cf.* Finland's objection to Yemen's reservations to article 5 of the 1966 Convention on the Elimination of All Forms of Racial Discrimination: "By making a reservation a State cannot contract out from universally binding human rights standards [but this is true as a general rule]" (*Multilateral Treaties ...*, chap. IV.2).

[1689] In that regard, see the dissenting opinion of *ad hoc* Judge Sørenson in the *North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 248; see also M. Coccia, footnote 196 above, p. 32.

[1690] *Cf.* article 38, paragraph 1 (b), of the Statute of the International Court of Justice. In that regard, see R.R. Baxter, "Treaties and customs", *Recueil des cours ...*, vol. 129 (1970–I), p. 50; M. Coccia, footnote 175 above, p. 31; G. Gaja, footnote 1687 above, p. 451; and G. Teboul, footnote 1583 above, pp. 711–714. Under certain (but not all) circumstances, the same may be true of the existence of a reservation clause (see P.-H. Imbert, footnote 25 above, p. 246, and P. Reuter, "Solidarité ...", footnote 405 above, p. 631 (also reproduced in P. Reuter, *Le développement ...*, footnote 405 above, pp. 370 and 371), note 16).

[1691] Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40, vol. I), pp. 131–132, para. 7.

- If the customary nature of the rule is well-established, States remain bound by it, independently of the treaty;[1692]
- Despite appearances, States may have a rationale for their action – for example, the desire to avoid placing the obligations in question within the purview of the monitoring or dispute settlement mechanisms envisaged in the treaty or to limit the role of domestic judges, who may have different competences with respect to treaty rules, on the one hand, and customary rules, on the other;[1693]
- Moreover, as noted by France in its observations on general comment No. 24, "the State's duty to observe a general customary principle should [not] be confused with its agreement to be bound by the expression of that principle in a treaty, especially with the developments and clarifications that such formalization involves";[1694]
- And, lastly, a reservation may be the means by which a "persistent objector" manifests the persistence of its objection; the objector may certainly reject the application, through a treaty, of a rule which cannot be invoked against it under general international law.[1695]

(8) The question has been raised, however, whether this solution can be transposed to the field of human rights.[1696] The Human Rights Committee challenged this view on the basis of the specific characteristics of human rights treaties:

> "Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction."[1697]

(9) First, it should be noted that the Committee confirmed that reservations to customary rules are not excluded *a priori*. In arguing to the contrary in the specific case of human rights treaties, it simply notes that these instruments are designed to protect the rights of individuals. But this premise does not have the consequences that the Committee attributes to it[1698] — first, because a reservation to a human rights treaty provision which reflects a customary rule

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[1692] See guideline 4.4.2 and commentary.

[1693] Such is the case in France, where treaties (under article 55 of the Constitution), but not customary norms, take precedence over laws; see the 20 October 1989 decision by the Assembly of the French Council of State in the *Nicolo* case, *Recueil Lebon*, p. 748, Frydman's conclusions, and the 6 June 1997 decision in the *Aquarone* case, *Recueil Lebon*, p. 206, Bachelier's conclusions.

[1694] Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40* (A/51/40, vol. I), p. 104, para. 5; in the same vein, see the comment by the United States of America (in the Committee's 1996 report, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40, vol. I), pp. 126–130). See also Gérard Cohen-Jonathan, "Les réserves dans les traités de droits de l'homme", *RGDIP*, vol. 70 (1966), pp. 932 and 933.

[1695] See Françoise Hampson, Reservations to human rights treaties: final working paper (E/CN.4/Sub.2/2004/42), note 45.

[1696] See A. Pellet, second report on reservations to treaties (A/CN.4/477/Add.1), paras. 143–147. See also B. Simma and G.I. Hernandéz, footnote 1614 above, pp. 63–68.

[1697] General comment No. 24 (CCPR/C/21/Rev.1/Add.6), para. 8.

[1698] For an opposing view, see Thomas Giegerich, "Vorbehalte zu Menschenrechtsabkommen: Zulässigkeit, Gültigkeit und Prüfungskompetenzen von Vertragsgremien – Ein konstitutioneller Ansatz", ZaöRV, vol. 55 (1995), p. 744 (English summary, pp. 779 and 780). See also A. Pellet and D. Müller, "From Bilateralism to Community Interest – Reservations to Human Rights Treaties: Not an Absolute Evil ...", footnote 1623 above, pp. 531–533.

in no way absolves the reserving State of its obligation to respect the rule as such[1699] and, second, because in practice it is quite likely that a reservation to such a rule (especially if it is a peremptory norm) will be incompatible with the object and purpose of the treaty by virtue of the applicable general rules.[1700]

(10) On the more general issue of codifying conventions, it might be wondered whether reservations to them are not incompatible with their object and purpose. There is no doubt that "*le désir de codifier s'accompagne normalement du souci de preserver la règle qui est affirmée*" [the desire to codify is normally accompanied by a concern to preserve the rule being affirmed].[1701] "*En effet, si l'on peut, à l'occasion d'un traité de codification, formuler une reserve portent sur une disposition d'origine coutumière, le traité de codification aura (...) manqué son but* ..." [if it were possible to formulate a reservation to a provision of customary origin in the context of a codification treaty, the codification treaty would fail in its objectives],[1702] to the point that reservations and, at all events, multiple reservations, have

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[1699] See paragraph (7) above and guideline 4.4.2 (Absence of effect on rights and obligations under customary international law). According to the Human Rights Committee, "a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language" (general comment No. 24, cited in footnote 1697 above, para. 8). This is certainly true, but it does not automatically mean that reservations to the relevant provisions of the Covenant are prohibited; if these rights must be respected, it is because of their customary and, in some cases, peremptory nature, not because of their inclusion in the Covenant. For a similar view, see G. Gaja, "Le riserve ...", footnote 1687 above, p. 452. Furthermore, the Committee simply makes assertions; it does not justify its identification of customary rules attached to these norms; in another context, it has been said that "[t]he 'ought' merges with the 'is', the *lex ferenda* with the *lex lata*" (Theodore Meron, "The Geneva Conventions as customary norms", AJIL, vol. 81 (1987) p. 55; see also W.A. Schabas's well-argued critique concerning articles 6 and 7 of the Covenant ("Invalid Reservations ...", footnote 1613 above, pp. 296–310).

[1700] In that regard, see Françoise Hampson's working paper on reservations to human rights treaties (E/CN.4/Sub.2/1999/28, para. 17) and her final working paper on that topic (E/CN.4/Sub.2/2004/42, para. 51): "In theory, a State may make a reservation to a treaty provision without necessarily calling into question the customary status of the norm or its willingness to be bound by the customary norm. Nevertheless, in practice, reservations to provisions which reflect customary international law norms are likely to be viewed with considerable suspicion."

[1701] P.-H. Imbert, footnote 25 above, p. 246; see also G. Teboul, footnote 1583 above, p. 680, who notes: "*Toutes deux utiles, les notions de réserve et de convention de codification s'accommodent mal l'une de l'autre*" [while both are useful, the concepts of reservation and codification convention are hard to reconcile with one another]. His study provides a clear overview of the whole question of reservations to codification conventions (*ibid.*, pp. 679–717, *passim*).

[1702] P. Reuter, "Solidarité ...", footnote 405 above, pp. 630 and 631 (also reproduced in *Le développement* ..., footnote 405 above, p. 370). The author adds that, for this reason, the treaty would also give rise to a situation further from its object and purpose than if it had not existed, since the scope of application of a general rule would be restricted (*ibid.*). This second statement is more debatable: it seems to assume that the reserving State, by virtue of its reservation, is exempt from the application of the rule; this is not the case (see footnote XXX below).

been viewed as "*la négation même du travail de codification*" [the very negation of the work of codification].[1703]

(11) This does not mean that, in essence, any reservation to a codification treaty is incompatible with its object and purpose:

- It is true that reservations are hardly compatible with the desired objective of standardizing and clarifying customary law but, "*à y bien réfléchir, l'équilibre d'ensemble auquel la réserve porte atteinte, constitue non l'objet et le but du traité lui-même, mais l'objet et le but de la négociation dont ce traité émane*" [on reflection, the overall balance which the reservation threatens is not the object and purpose of the treaty itself, but the object and purpose of the negotiations which gave rise to the treaty];[1704]
- The very concept of a "codification convention" is tenuous. As the Commission has often stressed, it is impossible to distinguish between the codification *stricto sensu* of international law and its progressive development.[1705] "*Quel quantum de règles d'origine coutumière un traité doit-il contenir pour être qualifié de 'traité de codification'?*" [how many rules of customary origin must a treaty contain in order to be defined as a "codification treaty"?];[1706]
- The status of the rules included in a treaty is not unchangeable over time: a rule which falls under the heading of progressive development may become pure codification and a "codification convention" often crystallizes as rules of general international law rules which did not have that status at the time of its adoption.[1707]

(12) Thus, the nature of codification conventions does not, as such, constitute an obstacle to the formulation of reservations to some of their provisions on the same grounds (and with the same limits) as any other treaty, and the arguments that can be put forward, in general terms, in support of the right to formulate reservations to a treaty provision that sets forth a customary rule[1708] are also fully transposable to them. Moreover, there is well-established practice in this area: there are more reservations to human rights treaties and codification treaties than to any other type of treaty.[1709] And while some objections may have been based on the customary nature of the rules concerned,[1710] the specific nature of these conventions seems never to have been invoked in support of a declaration of incompatibility with their object and purpose.

[1703] R. Ago in *Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, p. 153, para. 58.

[1704] G. Teboul, footnote 1583 above, p. 700.

[1705] See, for example, the Commission's reports on its eighth (1956) and forty-seventh (1995) sessions, *Yearbook ... 1956*, vol. II, pp. 255–256, para. 26, and *Yearbook ... 1996*, vol. II (Part Two), p. 86, paras. 156 and 157.

[1706] P. Reuter, "Solidarité ...", footnote 405 above, p. 632 (also reproduced in *Le développement ...*, footnote 405 above, p. 371).

[1707] See paragraph (13) below; on the issue of the death penalty with regard to articles 6 and 7 of the 1966 Covenant on Civil and Political Rights (taking a contrary position), see W.A. Schabas, "Invalid reservations ...", footnote 1613 above, pp. 308–310.

[1708] See paragraph (2) above.

[1709] For example, as of 20 June 2011, the Vienna Convention on Diplomatic Relations was the object of 51 reservations or declarations by 31 States parties (*Multilateral Treaties ...*, chap. III.3) and the 1969 Vienna Convention on the Law of Treaties was the object of 68 reservations or declarations by 34 States (*ibid.*, chap. XXXIII.1). For its part, the 1966 Covenant on Civil and Political Rights, has attracted 196 reservations or declarations by 62 States (*ibid.*, chap. IV.4).

[1710] See paragraph (2) above.

(13) The customary nature of the rule "reflected" by the treaty provision to which a reservation is formulated must be assessed at the time of formulation. It is not out of the question that the adoption of the treaty contributed to crystallizing the customary nature of the rule, especially if the reservation is formulated long after the treaty was concluded.[1711]

(14) The Commission did not consider it necessary to draft a specific guideline on reservations to a treaty provision reflecting a peremptory norm of general international law (*jus cogens*). Such a norm is, in almost all cases, customary in nature.[1712] It follows that the reasoning applicable to reservations to treaty provisions reflecting "normal" customary rules can be transposed to reservations to provisions reflecting *jus cogens* norms.

(15) However, according to Reuter, since a reservation, through acceptance by other parties, establishes a "contractual relationship" among the parties, a reservation to a treaty provision that sets forth a peremptory norm of general international law is inconceivable: the resulting agreement would automatically be null and void as a consequence of the principle established in article 53 of the Vienna Convention.[1713]

(16) This reasoning is far from self-evident: it is based on one of the postulates of the "opposability" school, according to which the question of the validity of reservations is left entirely to the subjective judgement of the contracting States or contracting organizations and depends only on the provisions of article 20 of the 1969 and 1986 Conventions.[1714] This assumption meets with serious objections;[1715] above all, it likens the reservations mechanism to the process by which a treaty is concluded, whereas a reservation is a *unilateral* act; although linked to the treaty, it has no exogenous effects. By definition, it "purports to exclude or to modify the legal effect of *certain provisions of the treaty* in their application" to the reserving State[1716] and, if it is accepted, those are indeed its consequences;[1717] however, whether or not it is accepted, "surrounding" international law remains intact; the legal situation of interested States is affected by it only in their *treaty relations*.[1718] Other, more numerous authors assert the incompatibility of any reservation with a provision which reflects

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[1711] In its judgment of 20 February 1969 in the *North Sea Continental Shelf* cases, the International Court of Justice also recognized that "a norm-creating provision [may constitute] the foundation of, or [generate] a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed" (*I.C.J. Reports 1969*, p. 41, para. 71).

[1712] Although the wording of article 53 of the 1969 and 1986 Vienna Conventions does not exclude the possibility that a treaty rule may, by itself, be a peremptory norm.

[1713] P. Reuter, "Solidarité ...", footnote 405 above, pp. 630–631 (also reproduced in P. Reuter, *Le développement* ..., footnote 405 above, p. 360). See also G. Teboul, footnote 1583 above, pp. 690 and 707.

[1714] "The validity of a reservation depends, under the Convention's system, on whether the reservation is or is not accepted by another State, not on the fulfilment of the condition for its admission on the basis of its compatibility with the object and purpose of the treaty" (J.M. Ruda, footnote 56 above, p. 190).

[1715] A. Pellet, first report on the law and practice relating to reservations to treaties (A/CN.4/470), paras. 100–105. See also paragraph (4) of the general commentary to Part 3 of the Guide to Practice and paragraph (11) of the commentary to guideline 4.1.

[1716] *Cf.* article 2, paragraph 1 (d), of the Vienna Conventions, reproduced in guideline 1.1.

[1717] See article 21 of the Vienna Conventions.

[1718] See section 4.4 of the Guide to Practice (Effect of a reservation on rights and obligations independent of the treaty).

a peremptory norm of general international law, either without giving any explanation,[1719] or arguing that such a reservation would, *ipso facto*, be contrary to the object and purpose of the treaty.[1720]

(17) This is also the position of the Human Rights Committee in its general comment No. 24:

> "Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant."[1721]

This formulation is debatable[1722] and, in any case, cannot be generalized: it is perfectly conceivable that a treaty might refer marginally to a rule of *jus cogens* without the latter being its object and purpose.

(18) It has, however, been argued that "*la règle prohibant la derogation à une règle de* jus cogens *vise non seulement les rapports conventionnels mais aussi tous les actes juridiques, dont les actes unilatéraux*" [the rule prohibiting derogation from a rule of *jus cogens* applies not only to treaty relations, but also to all legal acts, including unilateral acts].[1723] This is certainly true and in fact constitutes the most convincing argument for not transposing to reservations to provisions expressing peremptory norms the reasoning that results in not excluding, in principle, the right to formulate reservations to treaty provisions reflecting customary rules.[1724]

(19) Conversely, it should be noted that when formulating a reservation, a State may, it is true, be seeking to exempt itself from the rule to which the reservation relates, and in the case of a peremptory norm of general international law this is out of the question[1725] – particularly since it is unacceptable that a persistent objector should be able to thwart such a norm. The objectives of the reserving State, however, may be different: while accepting the content of the rule, it may wish to escape the consequences arising out of it, particularly in respect of monitoring,[1726] and on this point there is no reason why the line of argument followed in

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[1719] See, for example, R. Riquelme Cortado, footnote 150 above, p. 147.

[1720] See also the dissenting opinion of Judge Tanaka in the *North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 182.

[1721] CCPR/C/21/Rev.1/Add.6, 11 November 1994, para. 8. In its comments, France argued that "paragraph 8 is drafted in such a way as to link the two distinct legal concepts: of 'peremptory norms' and rules of 'customary international law' to the point of confusing them". (See report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40* (A/51/40), vol. I, p. 104, para. 3.)

[1722] *Cf.* the doubts expressed on this subject by the United States of America which, in its observations on general comment No. 24, transposes to provisions expressing peremptory norms the solution applicable to provisions expressing customary rules: "It is clear that a State cannot exempt itself from a peremptory norm of international law by making a reservation to the Covenant. It is not at all clear that a State cannot choose to exclude one means of enforcement of particular norms by reserving against inclusion of those norms in its Covenant obligations" (*Official Records of the General Assembly, Fiftieth Session* (A/50/40), vol. I, p. 127).

[1723] G. Teboul, footnote 1583 above, p. 707, note 52, referring to J.-D. Sicault, "Du caractère obligatoire des engagements unilatéraux en droit international public", *RGDIP*, vol. 83 (1979), p. 663, and the legal literature cited therein.

[1724] This is true *a fortiori* if we consider the reservation/acceptance "pair" as an agreement amending the treaty in the relations between the two States concerned. (See M. Coccia, footnote 196 above, pp. 30–31; see also the position of P. Reuter referred to in paragraph (15) above); this analysis, however, is unconvincing (see paragraph (16) above).

[1725] There are, of course, few examples of reservations which are clearly contrary to a norm of *jus cogens*.

[1726] See paragraph (7) above.

respect of customary rules which are *jus dispositivum* should not be transposed to peremptory norms.

(20) It should be noted, however, that there are other ways for States to avoid the consequences of the inclusion in a treaty of a peremptory norm of general international law: they may formulate a reservation, not to the substantive provision concerned, but to "secondary" articles governing treaty relations (monitoring, dispute settlement, interpretation), even limiting their scope to a particular substantive provision.[1727]

(21) Dissociation of this sort is illustrated by the line of argument followed by the International Court of Justice in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*:

> "In relation to the DRC's argument that the reservation in question [to article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination] is without legal effect because, on the one hand, the prohibition on racial discrimination is a peremptory norm of general international law and, on the other, such a reservation is in conflict with a peremptory norm",

the Court referred

> "to its reasoning when dismissing the DRC's similar argument in regard to Rwanda's reservation to Article IX of the Genocide Convention (see paragraphs 64–69 above [[1728]]): the fact that a dispute concerns non-compliance with a peremptory norm of general international law cannot suffice to found the Court's jurisdiction to entertain such a dispute, and there exists no peremptory norm requiring States to consent to such jurisdiction in order to settle disputes relating to the Convention on Racial Discrimination."[1729]

In this case, it is clear that the Court found that the peremptory nature of the prohibition on racial discrimination did not invalidate the reservations relating not to the prohibitory norm itself but to the rules surrounding it.

(22) While it is of the view that the principle stated in guideline 3.1.5.3 applies to reservations to treaty provisions reflecting a customary peremptory norm,[1730] the Commission considers that States and international organizations should refrain from formulating such reservations and, when they deem it indispensable, should instead formulate reservations to the provisions concerning the treaty regime governing the rules in question.

[1727] In this regard, see, for example, the reservations of Malawi and Mexico to the International Convention against the Taking of Hostages of 1979, subjecting the application of article 17 (dispute settlement and jurisdiction of the Court) to the conditions of their optional declarations pursuant to article 36 (2) of the Statute of the International Court of Justice, *Multilateral Treaties* ..., chap. XVIII.5. There can be no doubt that such reservations are not prohibited in principle; see guideline 3.1.5.7 and commentary.

[1728] On this aspect of the judgment, see paragraphs (2) and (3) of the commentary to guideline 3.1.5.7.

[1729] *Jurisdiction of the Court and Admissibility of the Application*, Judgment of 3 February 2006, para. 78.

[1730] On the effects of such reservations, see guideline 4.4.3 (Absence of effect on a peremptory norm of general international law (*jus cogens*)).

3.1.5.4 Reservations to provisions concerning rights from which no derogation is permissible under any circumstances

A State or an international organization may not formulate a reservation to a treaty provision concerning rights from which no derogation is permissible under any circumstances, unless the reservation in question is compatible with the essential rights and obligations arising out of that treaty. In assessing that compatibility, account shall be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.

Commentary

(1) At first sight, the question of reservations to provisions concerning obligations from which no derogation is permissible under any circumstances[1731] contained in human rights treaties, as well as in certain conventions on the law of armed conflict,[1732] environmental protection[1733] or diplomatic relations,[1734] may appear very similar to the question of reservations to treaty provisions reflecting peremptory norms of general international law;[1735] it can, however, be resolved on its own terms. States frequently justify their objections to reservations to such provisions on the grounds of the treaty-based prohibition against suspending their application whatever the circumstances.[1736]

(2) Clearly, to the extent that non-derogable provisions relate to rules of *jus cogens*, the reasoning applicable to the latter applies also to the former.[1737] However, the two are not necessarily identical.[1738] According to the Human Rights Committee:

[1731] On this concept, see C. Dtenersen, I. Oseredzuk, D. Premont (eds.), *Droits intangibles et états d'exception* (Bruylant, 1996), 644 p.; or Ludovic Hennebel, "Les droits intangibles" in E. Bribosia and L. Hennebel (eds.), *Classer les droits de l'Homme* (Bruylant, 2004), pp. 195–218.

[1732] The principles set out in common article 3, paragraph 1, of the 1949 Geneva Conventions are non-derogable and must be respected "at any time and in any place".

[1733] Although most environmental protection conventions contain rules considered to be non-derogable (see article 11 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal), they very often prohibit all reservations. See also article 311, paragraph 3, of the United Nations Convention on the Law of the Sea.

[1734] See article 45 of the Vienna Convention on Diplomatic Relations of 1961. See also International Court of Justice, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment of 24 May 1980, *I.C.J. Reports 1980*, p. 40, para. 86.

[1735] On this issue, see paragraphs (13) to (22) of the commentary to guideline 3.1.5. See also R. Riquelme Cortado, footnote 150 above, pp. 152–159; or A. Pellet, "Article 19 (1969)", footnote 1454 above, pp. 760–766, paras. 224–237; A. Pellet, 1969 Vienna Convention Article 19, footnote 1454 above, pp. 464–468, paras. 146–159.

[1736] See article 4, paragraph 2, of the 1966 International Covenant on Civil and Political Rights, article 15 (2) of the European Convention on Human Rights (see also article 3 of Protocol No. 6, article 4 (3) of Protocol No. 7 and article 2 of Protocol No. 13), and article 27 of the American Convention on Human Rights. Neither the International Covenant on Economic, Social and Cultural Rights nor the African Charter of Human and Peoples' Rights contain clauses of this type (see Fatsah Ouguergouz, "L'absence de clauses de dérogation dans certains traités relatifs aux droits de l'homme", *RGDIP*, vol. 98 (1994), pp. 289–335; in the same sense, Olivier de Frouville, *L'intangibilité des droits de l'homme en droit international* (Paris, Pedone, 2004), p. 302).

[1737] See the Human Rights Committee's general comment No. 24: "some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms [...] – the prohibition of torture and arbitrary deprivation of life are examples" (CCPR/C/21/Rev.1/Add.6, 11 November 1994, para. 10).

> "While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation."[1739]

This last point is question-begging and is undoubtedly motivated by reasons of convenience but is not based on any principle of positive law and could only reflect the progressive development of international law, rather than codification *stricto sensu*. Incidentally, it follows *a contrario* from this position that, in the Committee's view, if a non-derogable right is not a matter of *jus cogens*, it can in principle be the object of a reservation.

(3) The Inter-American Court on Human Rights declared in its advisory opinion of 8 September 1983 on *Restrictions to the Death Penalty*:

> "Article 27 of the Convention allows the States Parties to suspend, in time of war, public danger, or other emergency that threatens their independence or security, the obligations they assumed by ratifying the Convention, provided that in doing so they do not suspend or derogate from certain basic or essential rights, among them the right to life guaranteed by article 4. It would follow therefrom that a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it. The situation would be different if the reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose. Since the reservation referred to by the Commission in its submission does not appear to be of a type that is designed to deny the right to life as such, the Court concludes that to that extent it can be considered, in principle, as not being incompatible with the object and purpose of the Convention."[1740]

(4) In opposition to any possibility of formulating reservations to a non-derogable provision, it has been argued that, when any suspension of the obligations in question is excluded by the treaty, "with greater reason one should not admit any reservations, perpetuated in time until withdrawn by the State at issue; such reservations are … without any *caveat*, incompatible with the object and purpose of those treaties".[1741] This argument is not persuasive: it is one thing to prevent derogations from a binding provision, but another thing to determine whether a State is bound by the provision at issue.[1742] It is this second problem that needs to be resolved.

[1738] See the Human Rights Committee's general comment No. 29 (CCPR/C/21/Rev.1/Add.11), para. 11. See also R. Riquelme Cortado, footnote 150 above, pp. 153–155, or Teraya Koji "Emerging hierarchy in international human rights and beyond: from the perspective of non-derogable rights", EJIL, vol. 12 (2001), pp. 917–947.

[1739] General comment No. 24, cited in note 1737 above, para. 10.

[1740] OC-3/83, *Series A*, No. 3, p. 306, para. 61.

[1741] Separate opinion of Mr. Antonio Augusto Cançado Trindade, appended to the decision of the Inter-American Court dated 22 January 1999 in the case of *Blake*, *Series C*, No. 27, para. 11; see the favourable comment by R. Riquelme Cortado, footnote 150 above, p. 155. In the same sense, see the objection by the Netherlands mentioning that the United States reservation to article 7 of the 1966 International Covenant on Civil and Political Rights "has the same effect as a general derogation from this article, while according to article 4 of the Covenant, no derogation, not even in times of public emergency, are permitted" (*Multilateral Treaties …*, chap. IV.4).

[1742] See the observations of the United Kingdom on general comment No. 24 of the Human Rights Committee: "Derogation from a formally contracted obligation and reluctance to undertake the obligation in the first place are not the same thing" (Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session* (A/50/40), vol. I, p. 131, para. 6).

(5) It must therefore be accepted that, while certain reservations to non-derogable provisions are certainly ruled out because they would be contrary to the object and purpose of the treaty — this is not necessarily always the case.[1743] The non-derogable nature of a right protected by a human rights treaty reveals the importance with which it is viewed by the contracting States or contracting organizations, and it follows that any reservation aimed purely and simply at preventing its implementation is without doubt contrary to the object and purpose of the treaty.[1744] It does not follow, however, that this non-derogable nature in itself prevents a reservation from being formulated to the provision setting out the right in question, provided that it applies only to certain limited aspects relating to the implementation of that right.

(6) This balanced solution is well illustrated by Denmark's objection to the United States reservations to articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights:

> "Denmark would like to recall article 4, paragraph 2, of the Covenant, according to which no derogations from a number of fundamental articles, *inter alia* 6 and 7, may be made by a State Party even in time of public emergency which threatens the life of the nation.
>
> "In the opinion of Denmark, reservation (2) of the United States with regard to capital punishment for crimes committed by persons below 18 years of age as well as reservation (3) with respect to article 7 constitute general derogations from articles 6 and 7, while according to article 4, paragraph 2, of the Covenant such derogations are not permitted.
>
> "Therefore, and taking into account that articles 6 and 7 are protecting two of the most basic rights contained in the Covenant, the Government of Denmark regards the said reservations incompatible with the object and purpose of the Covenant, and consequently Denmark objects to the reservations."[1745]

Denmark objected not only because the United States reservations related to non-derogable rights, but also because their wording was such that they left essential provisions of the treaty empty of any substance. It should be noted that in certain cases, States parties formulated no objection to reservations relating to provisions in respect of which no derogation is permitted.[1746]

(7) Naturally, the fact that a provision may in principle be the object of derogation does not mean that all reservations relating to it will be permissible.[1747] The criterion of compatibility

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[1743] See Françoise Hampson, Reservations to human rights treaties: final working paper (E/CN.4/Sub.2/2004/42), para. 52; Rosalyn Higgins, "Human rights: some questions of integrity", *Michigan Law Review*, vol. 88 (1989), p. 15; J. McBride, footnote 1664 above, pp. 163–164; J. Polakiewicz, footnote 638 above, p. 113; or Catherine J. Redgwell, "Reservations to Treaties and Human Rights Committee General Comment No. 24 (52)", *ICLQ*, vol. 46 (1997), p. 402; *contra*: L. Lijnzaad, footnote 463 above, p. 91.

[1744] See guideline 3.1.5: "A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty ...".

[1745] *Multilateral Treaties* ..., chap. IV.4; see also, although they are less clearly based on the non-derogable nature of articles 6 and 7, the objections of Belgium, Finland, Germany, Italy, the Netherlands, footnote 1741 above, Norway, Portugal or Sweden (*ibid.*).

[1746] See the many examples given by W.A. Schabas relating to the 1966 International Covenant on Civil and Political Rights and the European and Inter-American human rights treaties, W.A. Schabas, "Reservations to human rights treaties ...", footnote XXX above, pp. 51–52, note 51.

[1747] *Cf.* C.J. Redgwell, "Reservations ...", footnote 1743 above, p. 402.

with the object and purpose of the treaty also applies to them. As O. de Frouville remarks, where non-derogable rights are concerned, assessing the compatibility of the reservation with the object and purpose of the treaty entails determining whether "*la reserve revient à nier l'existence d'un droit de l'Homme reconnu par la convention. (...) Mais qu'entend-on par la 'négation de l'existence' d'un droit? (...) On retrouve la distinction classique entre* l'essence *et* l'exercise *d'un droit. Un droit peut être réglementé dans son exercice, mais cette réglementation ne doit jamais attenter à sa substance.*" [the reservation amounts to denying the existence of a human right recognized by the convention. (…) But what is meant by "denying the existence" of a right? (…) Here we encounter the classic distinction between the *essence* and the *exercise* of a right. There may be regulation of the exercise of a right, but regulation must never undermine the substance of the right.][1748]

(8) This leads to several observations:

- In the first place, reservations to provisions from which a treaty allows no derogation are certainly possible provided they do not call into question the basic principle set forth in the treaty provision; in that situation, the methodological guidance contained in guideline 3.1.5.1[1749] is fully applicable;
- In the second place, however, it is necessary to proceed with the utmost caution, and this is why the Commission has drafted the first sentence of guideline 3.1.5.4 in the negative ("A State or an international organization may not formulate a reservation ..., unless ..."), as it has done on several occasions in the past when it wished to draw attention to the exceptional nature of certain behaviour in relation to reservations.[1750]

(9) Moreover, in elaborating this guideline the Commission took care not to give the impression that it was introducing an additional criterion of permissibility with regard to reservations: the assessment of compatibility referred to in the second sentence of the provision concerns the reservation's relationship to "the essential rights and obligations arising out of the treaty", the effect on "an essential element of the treaty" being cited as one of the criteria for incompatibility with the object and purpose.[1751]

3.1.5.5 Reservations relating to internal law

A reservation by which a State or an international organization purports to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in order to preserve the integrity of specific rules of the internal law of that State or of specific rules of that organization in force at the time of the formulation of the reservation may be formulated only insofar as it does not affect an essential element of the treaty nor its general tenour.

Commentary

(1) A reason frequently put forward by States in support of their formulation of a reservation relates to their desire to preserve the integrity of specific rules of their internal law.

[1748] O. de Frouville, footnote 1736 above, p. 302.

[1749] "Determination of the object and purpose of the treaty".

[1750] *Cf.* guidelines 2.3 (Late formulation of a reservation), 2.4.7 (Late formulation of an interpretative declaration), 2.5.11 (Effect of a partial withdrawal of a reservation), 3.1.3 (Permissibility of reservations not prohibited by the treaty) and 3.1.4 (Permissibility of specified reservations).

[1751] See guideline 3.1.5 and, in particular, paragraph (14) of the commentary thereto.

(2) Although similar in certain respects, a distinction must be drawn between such reservations and those arising out of vague or general reservations. The latter are often formulated by reference to internal law in general or to whole sections of such law (such as the constitution, criminal law, family law) without any further detail, thus making it impossible to assess the compatibility of the reservation in question with the object and purpose of the treaty. The question which guideline 3.1.5.5 seeks to answer is a different one, namely whether the formulation of a reservation (clearly expressed and sufficiently detailed) can be justified by considerations arising from internal law.[1752]

(3) Here again, in the Commission's view, a nuanced response is essential, and it is certainly not possible to respond categorically in the negative, as certain objections to reservations of this type would seem to suggest. For instance, several States have objected to the reservation made by Canada to the Convention on the Environmental Impact Assessment in a Transboundary Context of 25 February 1991, on the grounds that the reservation "renders compliance with the provisions of the Convention dependent on certain norms of Canada's internal legislation".[1753] Similarly, Finland objected to reservations made by several States to the Convention on the Rights of the Child of 1989 on the "general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty".[1754]

(4) This ground for objection is unconvincing. True, in accordance with article 27 of the Vienna Convention,[1755] a party may not "invoke the provisions of its internal law as justification for its failure to perform a treaty".[1756] The assumption, however, is that the issue is settled, that is, that the provisions in question are applicable to the reserving States; but that is precisely the question. As has been correctly pointed out, a State very often formulates a reservation *because* the treaty imposes on it obligations incompatible with its internal law, which it is not in a position to amend,[1757] at least initially.[1758] Moreover, article 57 of the

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[1752] See paragraphs (4) to (6) of the commentary to guideline 3.1.5.2.

[1753] See the objections of Spain, France, Ireland, Luxembourg, Norway and Sweden in *Multilateral Treaties ...*, chap. XXVI.4.

[1754] Objections by Finland to the reservations of Indonesia, Malaysia, Qatar, Singapore and Oman, *ibid.*, chap. IV.11. See also, for example, the objections of Denmark, Finland, Greece, Ireland, Mexico, Norway and Sweden to the second reservation of the United States to the Convention on the Prevention and Punishment of the Crime of Genocide, *ibid.*, chap. IV.1; concerning the wording of the reservation, see paragraph (6) of the commentary to guideline 3.1.5.2; see also paragraph (4) of that commentary.

[1755] Expressly invoked, for instance, by Estonia and the Netherlands to support their objections to the same reservation by the United States (*ibid.*).

[1756] In the words of article 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46" (which has to do with "imperfect ratifications"). The rule set out in article 27 of the Convention concerns treaties in force, whereas, by definition, a reservation purports to exclude or to modify the legal effect of the provision in question in its application to the author of the reservation.

[1757] See W.A. Schabas, "Reservations to the Convention on the Rights of the Child", footnote 1613 above, pp. 479–480 and also "Reservations to human rights treaties ...", footnote 969 above, p. 59.

[1758] Sometimes the reserving State indicates the period of time it will need to bring its domestic law into line with the treaty (as in the case of Estonia's reservation to the application of article 6, or Lithuania's to article 5, paragraph 3, of the European Convention on Human Rights, which set one-year time limits (http://conventions.coe.int/)), or it indicates its intention to do so (as in the case of the reservations Cyprus and Malawi made upon accession to the 1979 Convention on the Elimination of All Forms of Discrimination against Women, commitments which were in fact kept – see *Multilateral Treaties ...*, chap. IV.8); see also Indonesia's statement upon accession to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and

European Convention on Human Rights not only authorizes a State party to formulate a reservation where its internal law is not in conformity with a provision of the Convention, but restricts that right exclusively to instances where "a law ... in force in its territory is not in conformity with the provision".[1759] Apart from the European Convention, there are instances of reservations relating to the application of internal law that give rise to no objections and have in fact not met with any.[1760] On the other hand, this same provision expressly prohibits "reservations of a general character".

(5) What matters here is that the State formulating the reservation should not use its internal law[1761] as a cover for not actually accepting any new international obligations,[1762]

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their Disposal of 22 March 1989, *ibid.*, chap. XXVII.3). It is also not unusual for a State to withdraw a reservation formulated without a time indication, once it has amended the provisions of its national law that had prompted the reservation: (*cf.* the withdrawal by France, Ireland and the United Kingdom of several reservations to the Convention on the Elimination of All Forms of Discrimination against Women, *ibid.*, chap. IV.8); see also the successive partial withdrawals (1996, 1998, 1999, 2001) by Finland of its reservations to article 6, paragraph 1, of the European Convention on Human Rights or the full withdrawal by Serbia of its reservations to the same Convention on 10 May 2011 (http://conventions.coe.int/). Such practices are laudable and should definitely be encouraged (see guideline 2.5.3 in the Guide to Practice and the commentary thereto); yet they cannot be used as an argument for the impermissibility in principle of reservations relating to internal law.

[1759] See paragraph (8) of the commentary to guideline 3.1.2.

[1760] See, for example, Mozambique's reservation to the International Convention against the Taking of Hostages of 17 December 1979, *Multilateral Treaties ...*, chap. XVIII.5 (a similar reservation regarding the extradition of Mozambican nationals reappears in connection with other treaties such as, for example, the International Convention for the Suppression of the Financing of Terrorism (*ibid.*, chap. XVIII.11)); the reservations by Guatemala and the Philippines to the Convention on Consent for Marriage, Minimum Age for Marriage and Registration of Marriages of 1962 (*ibid.*, chap. XVI.3); the reservations by Colombia (made upon signature), the Islamic Republic of Iran and the Netherlands (though very vague) to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (*ibid.*, chap. VI.19). France's reservation to article 5, paragraph 1, of the European Convention on Human Rights has given rise to more extensive discussion: see Nicole Questiaux, "La Convention européenne des droits de l'homme et l'article 16 de la Constitution du 4 octobre 1958", *Revue des Droits Humains* (1970), pp. 651–663; Alain Pellet, "La ratification par la France de la Convention européenne des droits de l'homme", *Revue de droit public* (1974), pp. 1358–1365; or Vincent Coussirat-Coustère, "La réserve française à l'article 15 de la Convention européenne des droits de l'homme", *Journal du droit international*, vol. 102 (1975), pp. 269–293.

[1761] Or in the case of international organizations their "rules of the organization": the term is taken from articles 27 and 46 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. It also appears (and is defined) in article 2, subparagraph (b), of the Commission's draft articles on the responsibility of international organizations as adopted by the Commission on second reading in 2011 (see paragraph 88 of the present report). However, the reference to the rules of the organization may not raise a similar problem if the reservation only applies to the relations between the organization and its members.

[1762] O. de Frouville calls reservations that have effect "reserves potestatives" [potestative reservations] (see footnote 1736 above, pp. 347–349). In the same sense, F. Coulée points out that such reservations cast doubt on the reality of the State's commitment ("A propos d'une controverse autour d'une codification en cours: les reactions aux reserves incompatibles avec l'objet et le but des traits de protection des droits de l'homme", footnote XXX above, p. 503). In its concluding observations of 6 April 1995 on the initial report of the United States of America on its implementation of the 1996 International Covenant on Civil and Political Rights, the Human Rights Committee "regrets the extent of the State party's reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the whereas the aim of the treaty is to change the practice of States parties to the treaty. While article 27 of the Vienna Conventions cannot rightly be said to apply to the case in point,[1763] it should nevertheless be borne in mind that national laws are "merely facts" from the standpoint of international law[1764] and that the very aim of a treaty can be to lead States to modify them.

(6) The Commission preferred the expression "specific rules of the internal law" to "provisions of internal law", which might have seemed to suggest that only the written rules of a constitutional, legislative or regulatory nature were involved, whereas guideline 3.1.5.5 applies also to customary rules or case law. Similarly, the expression "rules of the organization" refers to the "established practice of the organization" as well as the constituent instruments and "decisions, resolutions and other acts of the international organization adopted in accordance with those instruments".[1765]

(7) The Commission is aware that guideline 3.1.5.5 may, on first reading, seem to be merely a repetition of the principle set out in article 19 (c) of the Vienna Conventions and reproduced in guideline 3.1. Its function is important, nonetheless: it is to establish that, contrary to an erroneous but fairly widespread perception, a reservation is not invalid solely because it aims to preserve the integrity of specific rules of internal law – on the understanding that, as is the case of any reservation, those made with such an objective must be compatible with the object and purpose of the treaty to which they relate.

3.1.5.6 Reservations to treaties containing numerous interdependent rights and obligations

To assess the compatibility of a reservation with the object and purpose of a treaty containing numerous interdependent rights and obligations, account shall be taken of that interdependence as well as the importance that the provision to which the reservation relates has within the general tenour of the treaty, and the extent of the impact that the reservation has on the treaty.

Commentary

(1) Reservations to complex treaties containing an interdependent set of rights and obligations pose particular problems, because it is especially difficult to determine at what point that interdependence, which is the *raison d'être* of the treaty, is threatened by a reservation relating to one of its elements.

(2) It is in the area of human rights that reservations to treaties of this type, whether universal (like the two 1966 Covenants) or regional (like the European or Inter-American

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United States has accepted what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant" (CCPR/CE/79/Add.50, para. 14). See the analysis by W.A. Schabas, footnote 1614 above, pp. 277–328; and J. McBride, footnote 1664 above, p. 172.

[1763] See paragraph (4) above.

[1764] Permanent International Court of Justice, *Polish Upper Silesia*, Judgment of 25 May 1926, *P.C.I.J., Series A*, No. 7, p. 19; see also Arbitration Commission for Yugoslavia, Opinion No. 1 of 29 November 1991, reproduced in RGDIP, vol. 96, (1992), p. 264. The principle is confirmed in article 4 of the International Law Commission's 2001 articles on responsibility of States for internationally wrongful acts, annexed to General Assembly resolution 56/83.

[1765] Article 2, subparagraph (b), of the Commission's draft articles on the responsibility of international organizations as adopted by the Commission on second reading in 2011 (see paragraph 88 of the present report).

conventions or the African Charter)[1766] have most often been formulated and have occasioned the liveliest debates on their permissibility.[1767] In view of the abundance of practice in that regard, the Commission initially devoted a separate draft guideline to reservations to general human rights treaties.[1768] On reflection, however, it appeared that the problem could be posed in the same terms in other areas (such as peace treaties or general conventions for the protection of the environment): what distinguishes the problems posed by reservations to such conventions is not that the conventions are intended to protect human rights[1769] but that reservations to them may undermine the interdependence which such treaties affirm and create among the different rights with which they deal. The distinctive nature of the problems in question is that they are often linked to the concept of "integral and interdependent treaties".[1770] However, authors taking this approach recognize that the category is not limited to human rights treaties.[1771] Hence there is no reason to depart from one of the principles consistently followed in the elaboration of the Guide to Practice by applying different rules to reservations according to the subject matter of the treaty,[1772] even though it is in the field of reservations to general human rights treaties that practice is the most abundant and enlightening.

[1766] These treaties are not the only ones covered by this guideline: a treaty such as the Convention on the Rights of the Child of 20 November 1989 also seeks to protect a very wide range of rights. See also the Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979) or the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990).

[1767] See A. Pellet and D. Müller, footnote 1623 above, pp. 533–535.

[1768] See draft guideline 3.1.12 (Reservations to general human rights treaties) provisionally adopted by the Commission at its fifty-ninth session (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), p. 113).

[1769] Whenever it considers that human rights treaties pose particular problems with regard to reservations, the Commission has pointed this out in the commentary; with respect to the guidelines on the permissibility of reservations, see in particular paragraphs (8) and (9) of the commentary to guideline 3.1.5.2 (Vague or general reservations), paragraphs (17) and (19) to (20) of the commentary to guideline 3.1.5.3 (Reservations to a provision reflecting a customary norm) and the commentary to guideline 3.1.5.4 (Reservations to provisions concerning rights from which no derogation is permissible under any circumstances), *passim*.

[1770] Sir Gerald Fitzmaurice, who promoted the concept, defined such instruments as "multilateral treaties the rights and obligations of which are not of the mutually reciprocating type, but which are either (a) of the interdependent type, where a fundamental breach of one of the obligations of the treaty by one party will justify a corresponding non-performance generally by the other parties, and not merely a non-performance in their relations with the defaulting party; or (b) of the integral type, where the force of the obligation is self-existent, absolute and inherent for each party, and not dependent on a corresponding performance by the others" (Third report on the law of treaties (A/CN.115), *Yearbook ... 1958*, vol. II, pp. 27–28).

[1771] Thus, for B. Simma, it is a question of "those multilateral treaties the rights and obligations of which are integral in the sense that they constitute an indivisible whole and have to be performed by every party vis-à-vis every other party" (B. Simma, footnote 99 above, p. 351). The author identifies two categories: "the first sub-group of such treaties, namely integral treaties embodying genuine reciprocity operative as between the parties, like treaties banning nuclear tests or the proliferation of nuclear weapons" and "integral treaties of the second variety, exemplified by human rights conventions" (*ibid.*, p. 352). F. Coulée defines integral obligations as "*des obligations conventionelles non réciproques visant non pas la satisfaction d'intérêts opposés, mais la protection d'un intérêt commun*" [non-reciprocal treaty obligations aiming not at the satisfaction of opposed interests but at the protection of a common interest] (F. Coulée, "A propos d'une controverse autour d'une codification en cours: les réactions aux réserves incompatibles avec l'objet et le but des traités de protection des droits de l'homme", *Mélanges offerts à Gérard Cohen-Jonathan*, footnote 1583 above, pp. 502. See also F. Capotorti, "Cours général de droit international public", *Recueil des cours*, vol. 248 (1994), p. 157; J. Pauwelyn, "A typology of multilateral treaty obligations: are WTO obligations bilateral or collective in nature?", EJIL, vol. 14 (2003), pp. 907–952; or F. Coulée, *Droit des traits et non-réciprocité: recherche sur l'obligation intégrale en droit international public*, thesis, (Université Paris 2, 1999). Some authors propose a civil-law analysis of the object and purpose of an integral treaty, an analysis based on the notion of "cause": "*Dans un traité réciproque, la cause d'un*

(3) In the case of the International Covenant on Civil and Political Rights, the Human Rights Committee stated in its general comment No. 24 that:

> "In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken."[1773]

Taken literally, this position would render invalid any general reservation bearing on any one of the rights protected by the Covenant.[1774] That is not, however, the position of States

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engagement d'une partie est l'engagement d'une autre partie. (...) Dans un traité intégral, à l'inverse, la cause de l'engagement est la même pour toutes les parties: c'est l'énoncé même. (...) Rechercher si une réserve est incompatible avec l'objet et le but du traité, dans un traité intégral, c'est donc rechercher si la réserve ne contredit pas la cause objectivement déterminée du traité, et, par conséquent, si l'Etat réservataire s'est véritablement engagé à respecter le traité. (...) Le critère de 'compatibilité avec l'objet et le but du traité' protège donc, dans un traité intégral, toutes les clauses qui participent à l'objet et au but du traité, qui comportent des obligations essentielles relativement à ceux-ci." [In a reciprocal treaty, the cause of a commitment made by one party is the commitment made by another party (…) In an integral treaty, on the other hand, the cause of commitment is the same for all parties: it is precisely what is enunciated. (…) To assess whether a reservation is incompatible with the object and purpose of the treaty in the case of an integral treaty is therefore to assess whether the reservation does not contradict the objectively determined cause of the treaty and hence whether the reserving State is truly committed to respecting the treaty. (…) The criterion of "compatibility with the object and purpose of the treaty" thus, in the case of an integral treaty, protects all the clauses that have to do with the object and purpose of the treaty, which constitute the essential obligations relative to them.] (O. de Frouville, footnote 1736 above, pp. 287–288).

[1772] Even authors who campaign for recognition of a special regime for reservations to human rights treaties explain that they would be based on a distinction that such treaties share with other normative treaties. F. Coulée, for example, puts forward the notion of their "*imperméabilité à la réciprocité*" [impermeability to reciprocity], a trait shared by "*la plupart des obligations conventionnelles en matière de protection de l'environnement, tout comme nombre d'obligations de droit humanitaire (...) qui sont des obligations intégrales.*" [most treaty obligations relating to environmental protection and a number of humanitarian law obligations (…) which are integral obligations] ("A propos d'une controverse autour d'une codification en cours: les réactions aux réserves incompatibles avec l'objet et le but des traités de protection des droits de l'homme", footnote 1771 above, p. 502).

[1773] CCPR/C/21/Rev.1/Add.6, 11 November 1994, para. 7. See Françoise Hampson, Reservations to human rights treaties: final working paper (E/CN.4/Sub.2/2004/42), para. 50; or D. Müller, "Commentaire sur l'article 48", in E. Decaux (ed.), *Le Pacte international relatif aux droits civils et politiques, Commentaire article par article* (Paris, Economica, 2011) pp. 802–803.

[1774] Some authors have maintained that the reservations regime is completely incompatible with human rights. See Pierre-Henri Imbert, who does not share this radical view, "La question des réserves et les conventions en matière de droits de l'homme", in *Actes du cinquième colloque sur la Convention européenne des droits de l'homme* (Paris, Pedone, 1982), p. 99 (also in English: "Reservations and human rights conventions", *Human Rights Review*, vol. 6 (1981), p. 28) or *Les réserves aux traités multilatéraux*, footnote 25 above, p. 249; M. Coccia, footnote 196 above, p. 16, or R.P. Anand, "Reservations to Multilateral Treaties", *Indian Journal of International Law*, vol. 1 (1960), p. 88; see also the commentary on Human Rights Committee parties, which have not systematically formulated objections to reservations of this type,[1775] and the Committee itself does not go that far since, in the paragraphs following the statement of its position of principle,[1776] it sets out in greater detail the criteria it uses to assess whether reservations are compatible with the object and purpose of the Covenant: it does not follow that, by its very nature, a general reservation bearing on one of the protected rights would be impermissible as such.

(4) Likewise, in the case of the Convention on the Rights of the Child of 1989, a great many reservations have been made to the provisions concerning adoption.[1777] As has been noted, "[i]t would be difficult to conclude that this issue is so fundamental to the Convention as to render such reservations contrary to its object and purpose".[1778]

(5) In contrast to treaties relating to a particular human right, such as the conventions on torture or racial discrimination, the object and purpose of general human rights treaties are complex.[1779] These treaties cover a wide range of human rights and are characterized by the global nature of the rights that they are intended to protect. Nevertheless, some of the protected rights may be more essential than others or at any rate it may be that a treaty provision dealing with them has a central place in the structure of the treaty.[1780] Moreover, even in the case of essential rights, one cannot rule out that a reservation dealing with certain limited aspects of the implementation of the right in question may be permissible. In this respect reservations to treaties relating to interdependent rights and obligations pose problems similar to those of reservations to provisions relating to non-derogable rights.[1781]

(6) Guideline 3.1.5.6 attempts to strike a particularly delicate balance[1782] between these different considerations by combining three elements:

- The interdependence of the rights and obligations;
- The importance that the provision to which the reservation relates has within the general tenour of the treaty; and
- The extent of the impact that the reservation has on the treaty.

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general comment No. 24 cited in note 1737 above, by Elena A. Baylis, "General comment 24: confronting the problem of reservations to human rights treaties", *Berkeley Journal of International Law*, vol. 17 (1999), pp. 277–329; Catherine J. Redgwell, footnote 1743 above, pp. 390–412; Rosalyn Higgins, "Introduction", in J.P. Gardner (ed.), footnote 1594 above, pp. xvii–xxix; or Konstantin Korkelia, "New challenges to the regime of reservations under the International Covenant on Civil and Political Rights", *E.J.I.L.*, vol. 13, (2002), pp. 437–477.

[1775] See, for example, the reservation of Malta to article 13 (on the conditions for the expulsion of aliens), to which no objection has been entered (*Multilateral Treaties ...*, chap. IV.4). See also the reservation by Barbados to article 14, paragraph 3, or the reservation by Belize to the same provision (*ibid.*); or the reservation by Mauritius to article 22 of the Convention on the Rights of the Child (*ibid.*, chap. IV.11).

[1776] See paragraphs 8 to 10 of general comment No. 24: these criteria, beyond that of the compatibility of a reservation with the object and purpose of the Covenant, have to do with the customary, peremptory or non-derogable nature of the norm in question; see guidelines 3.1.5.3 and 3.1.5.4.

[1777] Articles 20 and 21; see *Multilateral Treaties ...*, chap. IV.11.

[1778] W.A. Schabas, "Reservations to the Convention on the Rights of the Child", footnote 1613 above, p. 480.

[1779] See also A. Pellet and D. Müller, footnote 1623 above, pp. 539–541.

[1780] See paragraph (4) above.

[1781] See guideline 3.1.5.4 above, and in particular paragraphs (4) to (8) of the commentary.

[1782] On the importance of striking that balance with respect to human rights treaties, see A. Pellet and D. Müller, footnote 1623 above, pp. 523–524.

(7) The first element, the interdependence of the rights and obligations affected by the reservation, lays emphasis on the goal of achieving global realization of the object and purpose of a treaty and aims at preventing the dismantling of its obligations, that is, their disintegration into bundles of obligations, the individual, separate realization of which would not achieve the realization of the object of the treaty as a whole.

(8) The second element qualifies the previous one by recognizing — in keeping with practice — that nonetheless certain rights protected by these instruments are less essential than others – in particular, than the non-derogable ones.[1783] The importance of the provision concerned must, of course, be assessed in the light of the "general tenour" of the treaty, an expression taken from guideline 3.1.5.[1784]

(9) Lastly, the reference to "the extent of the impact that the reservation has" upon the right or the provision to which it relates allows for the inference that, even in the case of essential rights, reservations are possible if they do not preclude protection of the rights in question and do not have the effect of excessively modifying their legal regime.

3.1.5.7 Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty

A reservation to a treaty provision concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, unless:

(i) the reservation purports to exclude or modify the legal effect of a provision of the treaty essential to its *raison d'être*; or

(ii) the reservation has the effect of excluding the reserving State or international organization from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that it has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect.

Commentary

(1) In his first report on the law of treaties, Fitzmaurice categorically stated: "It is considered inadmissible that there should be parties to a treaty who are not bound by an

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[1783] See guideline 3.1.5.4 above. On the fundamental nature of a protected right, starting from the provision that guarantees it, O. de Frouville considers that a dual understanding is possible: "*L'examen de la pratique des États et des organes de contrôle montre que le constat de l'incompatibilité d'une réserve avec l'objet et le but du traité fait en réalité appel à deux types de considérations: il est d'abord question du caractère 'fondamental' d'un droit, caractère qui interdirait d'y apporter une réserve. Cette 'fondamentalité' renvoie elle-même à certaines caractéristiques du droit en question. Il est ensuite fait référence à l'impossibilité de 'nier' un droit ou de se soustraire totalement à l'obligation de le respecter, considération qui reflète l'idée d'intangibilité*." [An analysis of the practice of States and monitoring bodies shows that assessment of the incompatibility of a reservation with the object and purpose of the treaty actually calls for two types of considerations: first of all, there is the question of the "fundamental" nature of a right, which would prohibit a reservation to it. Whether it is fundamental or not in turn depends on certain characteristics of the right in question. The issue then arises of the impossibility of "denying" a right or of withdrawing completely from the obligation to respect it, a consideration that reflects the idea of non-derogability.] (O. de Frouville, footnote 1736 above, p. 294).

[1784] See in particular paragraph (14) (ii) of the commentary to guideline 3.1.5.

obligation for the settlement of disputes arising under it, if this is binding on other parties."[1785] His position, obviously inspired by the cold war debate on reservations to the Genocide Convention, is too sweeping; moreover, it was rejected by the International Court of Justice, which, in its Orders of 2 June 1999 in response to Yugoslavia's requests for the indication of provisional measures against Spain and against the United States in the cases concerning *Legality of Use of Force*, clearly recognized the validity of the reservations made by those two States to article IX of the Genocide Convention of 1948, which gives the Court jurisdiction to hear all disputes relating to the Convention,[1786] even though some of the parties thought that such reservations were not compatible with the object and purpose of the Convention.[1787]

(2) In its order on a request for the indication of provisional measures in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002)*, the Court came to the same conclusion with regard to the reservation of Rwanda to that same provision, stating that "that reservation does not bear on the substance of the law, but only on the Court's jurisdiction" and that "it therefore does not appear contrary to the object and purpose of the Convention".[1788] It upheld that position in its Judgment of 3 February 2006: in response to the Democratic Republic of the Congo, which had argued that the Rwandan reservation to article IX of the Genocide Convention "was invalid", after reaffirming the position it had taken in its advisory opinion of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,[1789] according to which a reservation to that Convention would be permitted provided it was not incompatible with the object and purpose of the Convention, the Court concluded:

> "Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention."[1790]

The International Court of Justice, confirming its prior case law, thus gave effect to Rwanda's reservation to article IX of the Genocide Convention. This conclusion is corroborated by the very common nature of such reservations and the erratic practice followed in the objections to them.[1791]

[1785] A/CN.4/101, *Yearbook ... 1956*, vol. II, p. 127, para. 96; this was the purpose of draft article 37, paragraph 4, which the Special Rapporteur was proposing (*ibid.*, p. 115).

[1786] *I.C.J. Reports 1999*, p. 772, paras. 29–33, and pp. 923–924, paras. 21–25.

[1787] See *Multilateral Treaties ...*, chap. IV.1 (see in particular the clear objections to that effect of Brazil, Mexico and the Netherlands).

[1788] Order of 10 July 2002, *I.C.J. Reports 2002*, p. 246, para. 72.

[1789] *I.C.J. Reports 1951*, footnote 604 above, p. 15.

[1790] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility*, Judgment of 3 February 2006, *I.C.J. Reports 2006*, para. 67.

[1791] See in this connection R. Riquelme Cortado, footnote 150 above, pp. 192–202. See also A. Pellet, "Article 19 (1969)", footnote 1454 above, pp. 742–744, paras. 199–201. A. Pellet, 1969 Vienna Convention Article 19, footnote 1454 above, pp. 452–454, paras. 199–122. As it happens, objections to reservations to dispute settlement clauses are rare, apart from the objections raised to reservations to article IX of the Genocide Convention, however, see the objections formulated by several States to the reservations to article 66 of the Vienna

(3) In their joint separate opinion, however, several judges expressed the view that the principle applied by the Court in its judgment might not be absolute in scope. They stressed that there might be situations where reservations to clauses concerning dispute settlement could be contrary to the treaty's object and purpose: it depended on the particular case.[1792]

(4) The Human Rights Committee, meanwhile, has considered that reservations to the International Covenant on Civil and Political Rights of 1966 relating to guarantees of its implementation and contained both in the Covenant itself and in the Optional Protocol thereto could be contrary to the object and purpose of those instruments:

> "These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. ... The Covenant ... envisages, for the better attainment of its stated objectives, a monitoring role for the Committee. Reservations that purport to evade that essential element in the design of the Covenant, which is ... directed to securing the enjoyment of the rights, are ... incompatible with its object and purpose. A State may not reserve the right not to present a report and have it considered by the Committee. The Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty."[1793]

With respect to the Optional Protocol, the Committee adds:

> "A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with the obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant. A reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to

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Convention on the Law of Treaties, in particular the objections of Germany, Canada, Egypt, the United States of America (which argued that the reservation of Syria "is incompatible with the object and purpose of the Convention and undermines the principle of impartial settlement of disputes concerning the invalidity, termination and suspension of the operation of treaties, which was the subject of extensive negotiation at the Vienna Conference" (*Multilateral Treaties ...*, chap. XXIII.1), Japan, New Zealand, the Netherlands ("provisions regarding the settlement of disputes, as laid down in article 66 of the Convention, are an important part of the Convention and ... cannot be separated from the substantive rules with which they are connected", *ibid.*), the United Kingdom ("These provisions are inextricably linked with the provisions of Part V to which they relate. Their inclusion was the basis on which those parts of Part V which represent progressive development of international law were accepted by the Vienna Conference", *ibid.*) and Sweden (espousing essentially the same position as the United Kingdom, *ibid.*).

[1792] Joint separate opinion of Judge Higgins, Judge Kooijmans, Judge Elaraby, Judge Owada and Judge Simma to the judgment of 3 February 2006, cited in footnote 1790 above, para. 21.

[1793] Human Rights Committee, general comment No. 24 (CCPR/C/21/Rev.1/Add.6), 11 November 1994, para. 11; see also Françoise Hampson, Reservations to human rights treaties: final working paper (E/CN.4/Sub.2/2004/42), para. 55.

> reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case."[1794]

Based on this reasoning, the Committee, in the *Rawle Kennedy* case, held that a reservation made by Trinidad and Tobago excluding the Committee's competence to consider communications relating to a prisoner under sentence of death was not valid.[1795]

(5) The European Court of Human Rights, in the *Loizidou* case, concluded from an analysis of the object and purpose of the European Convention on Human Rights "that States could not qualify their acceptance of the optional clauses thereby effectively excluding areas of their law and practice within their 'jurisdiction' from supervision by the Convention institutions"[1796] and that any restriction of its competence *ratione loci* or *ratione materiae* was incompatible with the nature of the Convention.[1797]

(6) This body of case law led the Commission to:

> 1. Recall that the formulation of reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty is not in itself precluded; this is the purpose of the "*chapeau*" of guideline 3.1.5.7,
>
> 2. Unless the regulation or monitoring in question is the purpose of the treaty instrument to which a reservation is being made,
>
> and
>
> 3. Nevertheless indicate that a State or an international organization cannot minimize its previous substantive treaty obligations by formulating a reservation to a treaty provision concerning dispute settlement or the monitoring of the implementation of the treaty at the time it accepts the provision.

(7) The Commission felt that there was no reason to draw a distinction between the two types of clauses: even if their purposes are somewhat different,[1798] the reservations that can be formulated to both types give rise to the same type of problems, and splitting them into two separate guidelines would have entailed setting out the same rules twice.

[1794] Human Rights Committee, general comment No. 24 mentioned above, para. 13. In the following paragraph, the Committee "considers that reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose".

[1795] Communication No. 845/1999, *Kennedy v. Trinidad and Tobago* (CCPR/C/67/D/845/1999), Report of the Human Rights Committee (*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40* (A/55/40), vol. II, annex XI.A, para. 6.7). To justify its reservation Trinidad and Tobago argued that it accepted "the principle that States cannot use the Optional Protocol as a vehicle to enter reservations to the International Covenant on Civil and Political Rights itself, but [it] stresses that its Reservation to the Optional Protocol in no way detracts from its obligations and engagements under the Covenant ..." (*Multilateral Treaties ...*, chap. IV.5). Seven States reacted with objections to the reservation, before Trinidad and Tobago finally denounced the Protocol as a whole (*ibid.*).

[1796] Judgment of 23 March 1995, *ECHR, Series A*, vol. 310, p. 27, para. 77.

[1797] *Ibid.*, paras. 70–89; see in particular paragraph 79. See also the decision of 4 July 2001 of the Grand Chamber on the admissibility of Application No. 48787/99 in the case of *Ilie Ilaşcu et al. v. Moldova and the Russian Federation*, p. 20, or the judgment of the Grand Chamber of 8 April 2004 in the case of *Assanidze v. Georgia* (Application No. 71503/01), para. 140.

[1798] Only somewhat, because the (non-binding) settlement of disputes may be one of the functions of a treaty monitoring body and part of its overall task of monitoring.

3.2 Assessment of the permissibility of reservations

The following may assess, within their respective competences, the permissibility of reservations to a treaty formulated by a State or an international organization:

- contracting States or contracting organizations;
- dispute settlement bodies;
- treaty monitoring bodies.

Commentary

(1) Guideline 3.2 introduces the section of the Guide to Practice dealing with assessment of the permissibility of reservations. It is a general provision whose purpose is to recall that there are various modalities for assessing permissibility which, far from being mutually exclusive, are mutually reinforcing – including when the treaty establishes a body to monitor its implementation. This statement corresponds to the one found in a different form in paragraph 6 of the Commission's 1997 preliminary conclusions on reservations to normative multilateral treaties including human rights treaties.[1799] Of course, these generally applicable modalities for the permissibility of reservations may be supplemented or replaced by specific modalities of assessment established by the treaty itself.

(2) It goes without saying, of course, that any treaty can include a special provision establishing particular procedures for assessing the permissibility of a reservation either by a certain percentage of the States parties or by a body with competence to do so. One of the most well-known and discussed clauses[1800] of this kind is article 20, paragraph 2, of the 1965 Convention on the Elimination of All Forms of Racial Discrimination:

> "A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. *A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties object to it.*"[1801]

[1799] "The Commission stresses that this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate, by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties" (*Yearbook ... 1997*, vol. II (Part Two), para. 157).

[1800] See, for example, Antonio Cassese, "A new reservations clause (article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination)", *Recueil d'études de droit international en hommage à Paul Guggenheim* (Geneva, I.U.H.E.I., 1968), pp. 266–304; C. Redgwell, footnote 1594, pp. 13–14; or R. Riquelme Cortado, footnote 150 above, pp. 317–322.

[1801] Emphasis added. Other examples are article 20 of the Convention concerning Customs Facilities for Touring of 4 June 1954, which authorizes reservations if they have been "accepted by a majority of the members of the Conference and recorded in the Final Act" (para. 1) or made after the signing of the Final Act without any objection having been expressed by one third of the Contracting States within 90 days from the date of circulation of the reservation of the Secretary-General (paras. 2 and 3); the similar clauses in article 14 of the Additional Protocol to this Convention and in article 39 of the Customs Convention on the Temporary Importation of Private Road Vehicles (see the *Handbook of Final Clauses prepared by the Treaty Section of the Office of Legal Affairs of the United Nations Secretariat* (ST/LEG/6), 5 August 1957, pp. 103–107); or article 50, para. 3, of the 1961 Single Convention on Narcotic Drugs and article 32, para. 3, of the 1971 United Nations Convention on Psychotropic Substances, which make the admissibility of

(3) This reservations clause no doubt draws its inspiration from the unsuccessful attempts made to include in the Vienna Convention itself a mechanism enabling a majority to assess the permissibility of reservations:[1802]

- Two of the four proposals submitted as rules *de lege ferenda* in 1953 by Hersch Lauterpacht made the acceptance of a reservation conditional upon the consent of two thirds of the States concerned;[1803]
- Fitzmaurice made no express proposal on this matter because he held to a strict interpretation of the principle of unanimity,[1804] yet on several occasions he let it be known that he believed that a collective assessment of the permissibility of reservations was the "ideal" system;[1805]
- Although Waldock had also not proposed such a mechanism in his first report in 1962,[1806] several members of the Commission supported it;[1807]
- During the Vienna Conference, an amendment to this effect proposed by Japan, the Philippines and the Republic of Korea[1808] was rejected by a large majority[1809] despite

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the reservation subject to the absence of objections by one third of the contracting States.

[1802] For a summary of the discussions on the matter by the Commission and during the Vienna Conference, see R. Riquelme Cortado, footnote 150 above, pp. 314–315.

[1803] Alternative drafts A and B of draft article 9 in his first report on the law of treaties (A/CN.4/63), *Yearbook ... 1953*, vol. II, pp. 91–92. Alternative drafts C and D, respectively, assigned the task of assessing the admissibility of reservations to a committee set up by the States parties and to a Chamber of Summary Procedure of the International Court of Justice (*ibid.*, p. 92); see also the proposals submitted during the drafting of the Covenant of Human Rights reproduced in Hersch Lauterpacht's second report (A/CN.4/87), *Yearbook ... 1954*, vol. II, p. 132.

[1804] First report (A/CN.4/101), *Yearbook ... 1956*, vol. II, pp. 115 and 126–127.

[1805] See in particular Gerald G. Fitzmaurice, "Reservations to multilateral conventions", *I.C.L.Q.* 1953, pp. 23–26.

[1806] First report (A/CN.4/144) *Yearbook ... 1962*, vol. II.

[1807] See especially Briggs in *Yearbook ... 1962*, vol. I, 651st meeting, of 25 May 1952, para. 28, and the 652nd meeting, 28 May 1962, paras. 73–74; Gros, 654th meeting, 30 May 1962, para. 43; Bartoš, 654th meeting, para. 66; *contra*: Rosenne, 651st meeting, para. 83; Tounkine, 653rd meeting, 29 May 1962, paras. 24–25 and 654th meeting, para. 31; Jiménez de Aréchaga, 653rd meeting, para. 47; and Amado, 654th meeting, para. 34. Waldock proposed alternative drafts reflecting these views (see 654th meeting, para. 16), and although they were rejected by the Commission, they appear in the commentary to draft article 18 (*Yearbook ... 1962*, vol. II, p. 179, para. (11)) and in the 1966 commentaries to draft articles 16 and 17 (*Yearbook ... 1966*, vol. II, p. 205, para. (11)). See also Waldock's fourth report (A/CN.4/177) *Yearbook ... 1965*, vol. II, p. 46, para. 3.

[1808] The amendment to article 16, para. 2, stipulated that, if objections "have been raised ... by a majority of the contracting States as of the time of expiry of the 12-month period, the signature, ratification, acceptance, approval or accession accompanied by such a reservation shall be without legal effect" (A/CONF.39/C.1/L.133/Rev.1 in *Documents of the Conference, Committee of the Whole*, footnote 54 above, para. 177 (i) (a)). The original amendment (A/CONF.39/C.1/L.133) had set a time limit of 3 months instead of 12 months. See also Japan's statement at the Conference, *Summary records*, A/CONF.39/11, footnote 35 above, Committee of the Whole, 21st meeting, 10 April 1968, para. 29, and 24th meeting, 16 April 1968, paras. 62–63; and another amendment along the same lines introduced by Australia (A/CONF.39/C.1/L.166 in A/CONF.39/11/Add.2, footnote 54 above, para. 179), which subsequently withdrew it (see *ibid.*, para. 181). Without submitting a formal proposal, the United Kingdom indicated that "there was an obvious need for some kind of machinery to ensure that the [compatibility] test was applied objectively, either by some outside body or through the establishment of a collegiate system for dealing with reservations which a large group of interested States considered to be incompatible with the object and purpose of the

the support of several delegations;[1810] the Expert Consultant Waldock,[1811] and some other delegations[1812] were very doubtful about this kind of collective monitoring system.

(4) It must be admitted, however, that such clauses — however attractive they may seem intellectually,[1813] — are, in any case, far from resolving all the problems: in practice they do not encourage States parties to maintain the special vigilance that is to be expected of them[1814] and they leave important questions unanswered:

- Do such clauses make it impossible for States parties to avail themselves of the right to raise objections under article 20, paragraphs 4 and 5, of the Vienna Convention? Given the very broad latitude that States have in this regard, the answer must be in the negative; indeed, States objecting to reservations formulated under article 20 of the International Convention on the Elimination of All Forms of Racial Discrimination have maintained their objections[1815] even though their position did not receive the support of two thirds of the States parties, which is needed for an "objective" determination of incompatibility under article 20;
- On the other hand, the mechanism set up by article 20 dissuaded the Committee on the Elimination of Racial Discrimination established under the Convention from taking a position on the permissibility of reservations,[1816] which raises the issue of whether the

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treaty" (*Summary records*, A/CONF.39/11, footnote 35 above, Committee of the Whole, 21st meeting, para. 76).

[1809] By 48 votes to 14, with 25 abstentions (A/CONF.39/11/Add.2, footnote 54 above, para. 182 (c)).

[1810] *Summary records*, A/CONF.39/11, footnote 35 above. The Swedish representative, while supportive in principle of the idea of a monitoring mechanism, believed that the Japanese proposal was "no more than an attempt at solving the problem" (22nd meeting, para. 32). See also the reservations expressed by the United States of America (24th meeting, para. 49) and by Switzerland (25th meeting, 16 April 1968, para. 9).

[1811] With regard to the amendment proposed by Japan and other delegations (see footnote 35 above), the view of the Expert Consultant was that "proposals of that kind, however attractive they seemed, would tilt the balance towards inflexibility and might make general agreement on reservations more difficult. In any case, such a system might prove somewhat theoretical, since States did not readily object to reservations" (*First Session, Summary records*, A/CONF.39/11, footnote 35 above, 24th meeting, 16 April 1968, para. 9).

[1812] Thailand (*ibid.*, 21st meeting, 10 April 1968, para. 47), Argentina (24th meeting, 16 April 1968, para. 45), Czechoslovakia (24th meeting, para. 68), Ethiopia (25th meeting, 16 April 1968, para. 17).

[1813] It is possible, though, to question the value of a collegiate system when the very purpose of a reservation is precisely "to cover the position of a State, which regarded as essential a point on which a two-thirds majority had not been obtained" (*Yearbook … 1962*, vol. I, Jiménez de Aréchaga, 654th meeting, 30 May 1962, para. 37). See also the sharp criticisms by Cassese, footnote 1800 above, *passim* and, in particular, pp. 301–304.

[1814] On the question of State inertia in this regard, see the comments of the Expert Consultant during the Vienna Conference, footnote 1812 above, and P.-H. Imbert, footnote 25 above, pp. 146–147, or R. Riquelme Cortado, footnote 150 above, pp. 316–321.

[1815] See *Multilateral Treaties …*, chap. IV.2.

[1816] "The Committee must take the reservations made by States parties at the time of ratification or accession into account: it has no authority to do otherwise. A decision — even a unanimous decision — by the Committee that a reservation is unacceptable could not have any legal effect" (*Official Records of the General Assembly, Thirty-third Session, Supplement No. 18* (A/33/18), para. 374). On this subject, see the comments of P.-H. Imbert, footnote 1774 above, pp. 125–126 (Human Rights Review, 1981, pp. 41–42); and Dinah Shelton, "State practice on reservations to human rights treaties", *Canadian Human Rights Yearbook*, 1983, pp. 229–230. Recently, however, the Committee on the Elimination of Racial Discrimination has taken a somewhat

Committee's attitude is the result of a discretionary judgment or whether, in the absence of specific assessment mechanisms, the monitoring bodies have to refrain from taking a position. Actually, nothing obliges them to do so; once it is recognized that such mechanisms are superimposed on the procedures provided for in the treaty for determining the permissibility of reservations, and that the human rights treaty bodies are called upon to rule on that point as part of their mandate,[1817] they can do so in every instance, just as States can.[1818]

(5) In reality, the controversy raging on this issue among the commentators can be ascribed to the conjunction of several factors:

- The issue really arises only in connection with human rights treaties;
- This is the case because, to begin with, it is in this area and only in this area that modern treaties almost invariably create mechanisms to monitor the implementation of the rules that they enunciate; however, while it has never been contested that a judge or an arbitrator is competent to assess the permissibility of a reservation, including its compatibility with the object and purpose of the treaty to which it refers,[1819] the human rights treaties endow the bodies which they establish with a variety of powers (some — at the regional level — can issue binding decisions but others, including the Human Rights Committee, can address to States only general recommendations or recommendations related to an individual complaint);
- This is a relatively new phenomenon which was not taken into account by the drafters of the Vienna Convention;
- Furthermore, the human rights treaty bodies have held to a particularly broad concept of their powers in this field: not only have they regarded themselves as competent to assess the compatibility of a reservation with the object and purpose of the treaty that established them, but they have also seemed to consider that they have a decision-making power to that end, even when they are not otherwise so empowered,[1820] and, applying the "severability theory, they have declared the States making the reservations they have judged to be impermissible to be bound by the treaty, including by the provision or provisions of the treaty to which the reservations related;[1821]

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more flexible position: for instance, in 2003, it stated with reference to a reservation made by Saudi Arabia that "the broad and imprecise nature of the State party's general reservation raises concern as to its compatibility with the object and purpose of the Convention. The Committee encourages the State party to review the reservation with a view to formally withdrawing it" (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 18* (A/58/18), para. 209).

[1817] See paragraph (8) below.

[1818] See also A. Pellet and D. Müller, footnote 1623 above, pp. 536–537 and pp. 542–544.

[1819] See footnote 1832 below.

[1820] See, in this connection, the comments of A. Aust, footnote 155 above, pp. 122–123.

[1821] Human Rights Committee, general comment No. 24, CCPR/C/21/Rev.1/Add.6, 11 November 1994, para. 18; communication No. 845/1999, *Rawle Kennedy v. Trinidad and Tobago*, CCPR/C/67/D/845/1999, Report of the Human Rights Committee, 2000 (A/55/40), vol. 2, annex XI.A, para. 6.7. This decision led the State party in question to denounce the Optional Protocol (see *Multilateral Treaties ...*, chap. IV.5), which did not prevent the Committee from declaring, in a subsequent decision of 26 March 2002, that it considered that Trinidad and Tobago had violated several provisions of the Covenant, including the provision to which the reservation related (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 40* (A/57/40), vol. II, annex IX.T).

- In doing so, they have aroused the opposition of States, which do not expect to be bound by a treaty beyond the limits they have accepted; some States have denied that the bodies in question have any jurisdiction in the matter.[1822]

(6) In reality, the issue is unquestionably less complicated than it is generally presented – which does not mean that the situation is entirely satisfactory. In the first place, there can be no doubt that the human rights treaty bodies are competent to assess the permissibility of a reservation, including the compatibility of the reservation with the object and purpose of the treaty, when the question comes before them in the exercise of their functions.[1823] Indeed, it must be acknowledged that the treaty bodies could not carry out their mandated functions if they could not be sure of the exact extent of their jurisdiction *vis-à-vis* the States concerned, whether in their consideration of complaints by States or individuals or of periodic reports, or in their exercise of an advisory function; it is therefore part of their functions to assess the permissibility of reservations made by the States parties to the treaties establishing them.[1824] Secondly, in so doing, they have neither more nor less authority than in any other area: the Human Rights Committee and the other international human rights treaty bodies which do not have decision-making power do not acquire it in the area of reservations; the regional courts which have the authority to issue binding decisions do have that power, but within certain limits.[1825] Thus, thirdly and lastly, while all the human rights treaty bodies (or dispute settlement bodies) may assess the permissibility of a contested reservation, they may not substitute their own judgement for the State's consent to be bound by the treaty.[1826] It goes without saying that the powers of the treaty bodies do not affect the power of States or organizations to accept reservations or object to them, as established and regulated under articles 20, 21 and 23 of the Vienna Conventions.[1827]

[1822] See in particular the very sharp criticisms expressed by the United States of America (Report of the Human Rights Committee to the General Assembly, 1995, A/50/40, vol. I, p. 127), the United Kingdom (*ibid.*, p. 132) and France (*ibid.*, 1996, A/51/40, vol. I, p. 102).

[1823] See paragraph 5 of the Commission's 1997 preliminary conclusions on reservations to normative multilateral treaties including human rights treaties: "… where these treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, *inter alia*, to the admissibility of reservations by States, in order to carry out the functions assigned to them" (footnote 1799 above, para. 157).

[1824] For an exhaustive presentation of the position of the human rights treaty bodies, see the second report on reservations to treaties, A/CN.4/477/Add.1, paras. 193–210; see also D.W. Greig, footnote 28 above, pp. 90–107; R. Riquelme Cortado, footnote 150 above, pp. 345–353 and, with particular reference to the bodies established by the European Convention on Human Rights, see I. Cameron and F. Horn, footnote 205 above, pp. 88–92.

[1825] See paragraph 8 of the Commission's preliminary conclusions: "The Commission notes that the legal force of the findings made by the monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role", footnote 1799 above.

[1826] The Commission has stated in this connection, in paragraphs 6 and 10 of its preliminary conclusions, that the competence of the monitoring bodies to assess the validity of reservations "does not exclude or otherwise affect the traditional modalities of control by the contracting parties ..." and "that, in the event of inadmissibility of the reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty" (*ibid.*).

[1827] See, however, Human Rights Committee general comment No. 24 (CCPR/C/21/Rev.1/Add.6), para. 18: "... It is an inappropriate task [the determination of the compatibility of a reservation with the object and purpose of the treaty] for States parties in relation to human rights treaties ...". This passage contradicts the preceding paragraph in which the Committee recognizes that "an objection to a reservation made by States may provide some guidance to the Committee in

(7) Similarly, although guideline 3.2 does not expressly mention the possibility that national courts might have competence in such matters, neither does it exclude it: domestic courts are, from the viewpoint of international law, an integral part of the "State", and they may, if on occasion, engage its responsibility.[1828] Hence, nothing prevents national courts, when necessary, from assessing the permissibility of reservations made by a State on the occasion of a dispute brought before them,[1829] including their compatibility with the object and purpose of a treaty.

(8) It follows that the competence to assess the permissibility of a reservation can also belong to international courts or arbitrators. This would clearly be the case if a treaty expressly provided for the intervention of a jurisdictional body to settle a dispute regarding the permissibility of reservations, but no reservation clause of this type seems to exist, even though the question easily lends itself to a jurisdictional determination.[1830] Nevertheless, there is no doubt that such a dispute can be settled by any organ designated by the parties to rule on differences in interpretation or application of the treaty. It should therefore be understood that any general clause on settlement of disputes establishes the competence of the body designated by the parties in that respect.[1831] What is more, that was the position of the International Court of Justice in its advisory opinion of 1951 on *Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide*:

> "It may be ... that certain parties, who consider that the assent given by other parties to a reservation is incompatible with the purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises either by special agreement or by the procedure laid down in Article IX of the Convention."[1832]

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its interpretation as to its compatibility with the object and purpose of the Covenant".

[1828] See article 4 (Conduct of organs of a State) of the Commission's articles on responsibility of States for internationally wrongful acts, General Assembly resolution 56/83 of 12 December 2001, annex.

[1829] See the decision of the Swiss Federal Tribunal of 17 December 1991 in the case of *Elisabeth B. v. The State Council of the Canton of Thurgau (Journal des Tribunaux*, I. *Droit fédéral*, 1995, pp. 523–537), and the commentary by J.-F. Flauss, footnote 673 above, pp. 297–303.

[1830] In this sense, see Henry J. Bourguignon, "The Belilos case: new light on reservations to multilateral treaties", *Virginia Journal of International Law* 1989, p. 359; or D. Bowett, footnote 150 above, p. 81.

[1831] On the role that dispute settlement bodies can play in this area, see guideline 3.2.5 below.

[1832] *I.C.J. Reports 1951*, footnote 604 above, p. 27. Likewise, in its decision of 30 June 1977, the arbitral tribunal constituted for the case concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic* implicitly held itself competent to rule on the permissibility of the French reservations by finding "that the three reservations to article 6 [of the Convention on the Continental Shelf of 1958] are true reservations and admissible" (*Reports of International Arbitral Awards (U.N.R.I.A.A.)*, vol. XVIII, p. 40, para. 56). See also the position of the International Court of Justice concerning the permissibility of "reservations" (of a specific nature, it is true, and different from those covered in the Guide to Practice – *cf.* guideline 1.5.3 (Unilateral statements made under a clause providing for options) and the commentary thereto, included in optional declarations of acceptance of its obligatory jurisdiction (see in particular its judgment of 26 November 1957, *Right of Passage over Indian Territory (Preliminary Objections)*, *I.C.J. Reports 1957*, pp. 141–144, the separate opinion of Judge Hersch Lauterpacht in the case concerning *Certain Norwegian Loans* (Judgment of 6 July 1957, *I.C.J. Reports 1957*, pp. 43–45) and his dissenting opinion in the *Interhandel* case (Judgment of 21 November 1959, *I.C.J. Reports 1959*, pp. 103–106 – see also the dissenting opinions of President Klaedstad and Judge Armand-Ugon, *ibid.*, pp. 75 and 93). See also the orders of 2 June 1999 in the cases concerning

(9) It must therefore be concluded that the competence to assess the permissibility of a reservation belongs, more generally, to the various entities that are called on to apply and interpret treaties: States, and, within the limits of their competence, their domestic courts, bodies for the settlement of disputes and for monitoring the implementation of the treaty; however, the positions that these bodies may adopt in such matters have no greater legal value than that accorded by their status: the verb "assess" that the Commission has chosen to use in the introductory sentence of guideline 3.2 is neutral and does not prejudge the question of the authority underlying the assessment. Similarly, the phrase "within their respective competences" indicates that the competence of the dispute settlement and monitoring bodies to carry out such an assessment is not unlimited but corresponds to the competences accorded to these bodies by States.

(10) On the other hand, in accordance with the widely prevailing principle of the "letter box depositary"[1833] endorsed by article 77 of the 1969 Vienna Convention,[1834] in principle the depositary can only take note of reservations of which it has been notified and transmit them to the contracting States[1835] without ruling on their permissibility.

(11) The present situation regarding assessment of the permissibility of reservations to treaties is therefore one in which there is concurrence, or at least coexistence of several mechanisms for assessing the permissibility of reservations:[1836]

- One of these, which constitutes general law, is the purely inter-State mechanism provided for by article 20 the Vienna Conventions and which can be adapted by special reservation clauses contained in the treaties concerned;
- Where the treaty establishes a body to monitor its implementation, it is accepted that such a body can also assess the permissibility of reservations, the position taken thereby having no greater authority than that accorded by the status of the body in question;
- However, this still leaves open the possibility for the States and international organizations parties to have recourse, where appropriate, to the customary methods of peaceful settlement of disputes, including judicial or arbitral methods, in the event of a dispute arising among them concerning the permissibility of a reservation;[1837]

Legality of Use of Force (Yugoslavia v. United States of America), I.C.J. Report 1999, p. 772, para. 29 to 33, and *Legality of Use of Force (Yugoslavia v. Spain), ibid.*, pp. 923–924, paras. 21 to 25; and the order of 10 July 2002 on *Armed Activities on the Territory of the Congo (New Application: 2002), I.C.J. Reports 2002*, p. 246, para. 72.

[1833] See paragraph (3) of the commentary to guideline 2.1.7 (Functions of depositaries). See also P. Kohona, "Some notable developments …", footnote 582 above, pp. 433–450; see also J. Combacau, "Logique de la validité contre logique de l'opposabilité dans la Convention de Vienne sur le droit des traités", *Le droit international au service de la paix, de la justice et du développement – Mélanges Michel Virally* (Paris, Pedone, 1991), p. 199.

[1834] Which corresponds to article 78 of the 1986 Convention.

[1835] See guideline 2.1.7 (Functions of depositaries) and commentary.

[1836] See the second report on reservations to treaties, A/CN.4/477/Add.1, paras. 211–215 or A. Pellet "Article 19 (1969)", footnote 1454 above, pp. 766–774, paras. 238–249; and A. Pellet, 1969 Vienna Convention Article 19, footnote 1454, pp. 469–472, paras. 160–169. For a very clear position in favour of the complementarity of systems of monitoring, see Lijnzaad, footnote XXX above, pp. 97–98; see also G. Cohen-Jonathan, "Les réserves dans les traités de droits de l'homme", *R.G.D.I.P.* 1966, p. 944.

[1837] Subject, however, to the possible existence of "self-contained regimes", among which those instituted by the European and inter-American conventions on human rights or the African Charter should undoubtedly be included (*cf.* Bruno Simma, "Self-contained regimes",

- It is not out of the question, moreover, that national courts, like those in Switzerland,[1838] may consider themselves entitled to determine the permissibility of a reservation in the light of international law – but that is not a supposition separate from the first bullet point, inasmuch as national courts are part of the State apparatus.

(12) It is clear that the multiplicity of possibilities for assessment presents certain disadvantages, not least of which is the risk of conflict between the positions different parties might take on the same reservation (or on two identical reservations of different States).[1839] In fact, however, this risk is inherent in any assessment system — over time, any given body may take conflicting decisions — and it is probably better to have too much assessment than no assessment at all.

(13) A more serious danger is that constituted by the succession of assessments over time, in the absence of any limitation of the duration of the period during which the assessment may be carried out. In the case of the "Vienna regime", article 20, paragraph 5, of the Convention, insofar as it is applicable, sets a time limit of 12 months following the date of receipt of notification of the reservation (or following the expression by the objecting State of its consent to be bound) on the period during which a State may formulate an objection.[1840] A real problem arises, however, in all cases of jurisdictional or quasi-jurisdictional assessments, which are unpredictable and depend on referral of the question to the monitoring or dispute settlement body. In order to overcome this problem, it has been proposed that the right of the monitoring bodies to give their opinion should also be limited to a 12-month period.[1841] Apart from the fact that none of the relevant treaties currently in force provides for such a limit, the limit seems scarcely compatible with the very basis of intervention by monitoring bodies, which is intended to continuously ensure compliance with the treaty by the parties, in particular the preservation of the object and purpose of the treaty. Furthermore, as has been pointed out, one of the reasons why States lodge few objections is precisely that the 12-month rule often allows them insufficient time;[1842] the same problem is liable to arise *a fortiori* for the monitoring bodies, so that the latter may find themselves paralysed.

(14) It could be concluded that the possibilities of cross-assessment in fact strengthen the opportunity for the reservations regime, and in particular the principle of compatibility with the object and purpose of the treaty, to play its real role. The problem is not to set up one

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Netherlands Yearbook of International Law, vol. 16 (1985), pp. 130 ff., or Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford, Clarendon Press, 1989), pp. 230 ff.).

[1838] See footnote 1829 above.

[1839] See, in particular, P.-H. Imbert, who refers to the risks of incompatibility within the European Convention system, in particular between the positions of the Court and the Committee of Ministers ["Reservations to the European Convention on Human Rights before the Strasbourg Commission: the Temeltasch case", (*I.C.L.Q.*, vol. 33 (1984), pp. 590–591) in French *R.G.D.I.P.*, 1983, pp. 617–619].

[1840] It should be noted that the problem nevertheless arises because ratifications and accessions are spread over time.

[1841] See P.-H. Imbert, footnote 25 above, p. 146, or footnote 1816 above, pp. 113–114 and 130–131 (*H.R.R.* 1981, pp. 36 and 44); *contra:* Héribert Golsong, statement to the Rome Colloquium, 5–8 November 1975, *Report of the fourth international colloquium on the European Convention on Human Rights*, Council of Europe, Strasbourg, 1976, pp. 269–270, and "Les réserves aux instruments internationaux pour la protection des droits de l'homme", in Catholic University of Louvain, Fourth Colloquium of the Department of Human Rights, 7 December 1978, *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme* (Brussels, Bruylant, 1982), para. 7; or R.W. Edwards, footnote 59 above, pp. 387–388.

[1842] See B. Clark, footnote 1631 above, pp. 312–314.

possibility against another or to affirm the monopoly of one mechanism,[1843] but to combine them so as to strengthen their overall effectiveness, for while their modalities differ, their end purpose is the same: the aim in all cases is to reconcile the two conflicting but fundamental requirements of integrity of the treaty and universality of participation. It is only natural that the States that wished to conclude the treaty should be able to express their point of view; it is also natural that the monitoring bodies should play fully the role of guardians of treaties entrusted to them by the parties.

(15) This situation does not exclude — in fact it implies — a degree of complementarity among the various methods of assessment, as well as cooperation among the bodies concerned. In particular, it is essential that, in assessing the permissibility of a reservation, monitoring bodies (as well as dispute settlement bodies) should take fully into account the positions taken by the contracting States or contracting organizations through acceptances or objections. Conversely, States, which are required to abide by the decisions taken by monitoring bodies when they have given those bodies decision-making power, should pay serious attention to the well-thought-out and reasoned positions of those bodies, even when the latter cannot take legally binding decisions.[1844]

3.2.1 Competence of the treaty monitoring bodies to assess the permissibility of reservations

1. A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization.

2. The assessment made by such a body in the exercise of this competence has no greater legal effect than that of the act which contains it.

[1843] It is, of course, the natural tendency of competent institutions to issue rulings; see the opposing points of view between the Human Rights Committee ("this is an inappropriate task for States parties in relation to human rights treaties" – general comment No. 24, footnote 1827 above, para. 18) and France ("it is [for States parties] and for them alone, unless the treaty states otherwise, to decide whether a reservation is incompatible with the object and purpose of the treaty", Report of the Human Rights Committee to the General Assembly, 1996 (A/51/40), vol. I, para. 7).

[1844] See, however, the extremely strong reaction to general comment No. 24 found in the bill submitted to the United States Senate by Senator Helms on 9 June 1995 in terms of which "no funds authorized to be appropriated by this Act nor any other Act, or otherwise made available may be obligated or expended for the conduct of any activity which has the purpose or effect of (A) reporting to the Human Rights Committee in accordance with article 40 of the International Covenant on Civil and Political Rights, or (B) responding to any effort by the Human Rights Committee to use the procedures of articles 41 and 42 of the International Covenant on Civil and Political Rights to resolve claims by other parties to the Covenant that the United States is not fulfilling its obligations under the Covenant, until the President has submitted to the Congress the certification described in paragraph (2).

> "(2) CERTIFICATION – The certification referred to in paragraph (1) is a certification by the President to the Congress that the Human Rights Committee established under the International Covenant on Civil and Political Rights has (A) revoked its general comment No. 24 adopted on November 2, 1994; and (B) expressly recognized the validity as a matter of international law of the reservations, understandings, and declarations contained in the United States instrument of ratification of the International Covenant on Civil and Political Rights" (a bill to authorize appropriations for the Department of State for fiscal years 1996 through 1999 ..., 104th Congress, 1st session, S.908-Report No. 104-95, pp. 87–88).

Commentary

(1) Guideline 3.2.1, like those that follow, clarifies the scope of the general guideline 3.2.

(2) Guideline 3.2 implies that the monitoring bodies established by the treaty[1845] are competent to assess the permissibility of reservations formulated by the contracting States or contracting organizations but does not expressly state this, unlike paragraph 5 of the preliminary conclusions adopted by the Commission in 1997, whereby even if the treaty is silent on the subject, the monitoring bodies established by normative multilateral treaties "are competent to comment upon and express recommendations with regard to the admissibility of reservations by States, in order to carry out the functions assigned to them".

(3) The meaning of this last phrase is illuminated by paragraph 8 of the preliminary conclusions:

> "The Commission notes that the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role."

(4) Guideline 3.2.1 combines these two principles by recalling, in the first paragraph, that the treaty monitoring bodies are necessarily competent to assess the permissibility of reservations made to the treaty whose implementation they are responsible for overseeing and, in the second paragraph, that the legal force of their findings in that regard cannot exceed that which is generally recognized for the instruments that they are competent to adopt.[1846]

(5) However, guideline 3.2.1 deliberately refrains from addressing the consequences of the assessment of the permissibility of a reservation: such consequences, which cannot be determined without considering the effects of the acceptance of reservations and of the objections that might be made to them, are explained in Part 4 of the Guide to Practice, on the effects of reservations and related declarations.

3.2.2 Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations

When providing bodies with the competence to monitor the application of treaties, States or international organizations should specify, where appropriate, the nature and the limits of the competence of such bodies to assess the permissibility of reservations.

Commentary

(1) Guideline 3.2.2 reproduces and incorporates in the Guide to Practice the basic idea underlying the recommendation set out in paragraph 7 of the preliminary conclusions of 1997,[1847] which reads as follows:

> "7. The Commission suggests providing specific clauses in normative multilateral treaties, including in particular human rights treaties, or elaborating protocols to

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[1845] In very rare cases, a monitoring body may also be set up after the adoption of a treaty, by collective decision of the parties or of an organ of an international organization – *cf.* the Committee on Economic, Social and Cultural Rights (Economic and Social Council resolution 1985/17 of 28 May 1985).

[1846] For more clarification on this point, see the commentary to guideline 3.2, in particular paragraphs (6) and (9).

[1847] See footnote 1799 above.

> existing treaties if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation."

(2) It would certainly not be appropriate to include a provision of this type in draft articles intended for adoption in the form of an international convention. Such is not the case, however, with the Guide to Practice, which is intended to constitute a "code of recommended practices" designed to "guide" the practice of States and international organizations with regard to reservations but without being legally binding.[1848] Moreover, the Commission decided to include in the Guide several other guidelines clearly drafted in the form of a recommendation to States and international organizations.[1849]

(3) On the other hand, the Commission, being well aware of the difficulties of this sort of enterprise, decided not to recommend expressly to States and international organizations that they should include in future multilateral treaties that provide for the establishment of a monitoring body specific clauses conferring competence on that body to assess the permissibility of reservations and specifying the legal effect of such assessments, even though that would undoubtedly be desirable when feasible.

(4) The Commission wishes to point out, moreover, that it does not purport in this guideline to take a position on the appropriateness of establishing such monitoring bodies. It merely considers that *if* such a body is established, it might be helpful to specify the nature and limits of its competence to assess the permissibility of reservations in order to avoid any uncertainty and controversy in the matter.[1850] This is what is meant by the neutral wording that introduces the guideline: "When providing bodies with the competence to monitor the application of treaties ...". In the same spirit, the expression "where appropriate" emphasizes the purely recommendatory nature of the guideline.

3.2.3 Consideration of the assessments of treaty monitoring bodies

States and international organizations that have formulated reservations to a treaty establishing a treaty monitoring body shall give consideration to that body's assessment of the permissibility of the reservations.

Commentary

(1) Guideline 3.2.3 reflects the spirit of the recommendation formulated in paragraph 9 of the preliminary conclusions of 1997, which states:

> "9. The Commission calls upon States to cooperate with monitoring bodies and give due consideration to any recommendations that they may make or to comply with their determination if such bodies were to be granted competence to that effect in the future."[1851]

(2) This call to States and international organizations to cooperate with monitoring bodies is carried over into guideline 3.2.3, which has nonetheless been reformulated so as to remove the ambiguity in the wording adopted in 1997: the phrase "if such bodies were to be granted

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[1848] On this subject, see paragraph (5) of the commentary to guideline 2.5.3.

[1849] See guideline 2.5.3 (Periodic review of the usefulness of reservations) and paragraph (5) of the commentary thereto; see also guidelines 2.1.2 (Statement of reasons for reservations), 2.6.9 (Statement of reasons), 2.9.5 (Form of approval, opposition and recharacterization) and 2.9.6 (Statement of reasons for approval, opposition and recharacterization).

[1850] See paragraph (1) above.

[1851] See footnote 1799 above.

competence to that effect *in the future*" seems to imply that they do not have such competence at the present time. This is not so, since there is no question but that they may assess the permissibility of reservations to treaties whose observance they are required to monitor.[1852] On the other hand, they may not:

- Compel reserving States and international organizations to accept their assessment, since they do not have general decision-making power;[1853] or
- Take the place of the author of the reservation, in any case, in determining the consequences to be drawn from the impermissibility of a reservation.[1854]

(3) Although paragraph 9 of the preliminary conclusions is drafted as a recommendation ("The Commission calls upon States ..."), it seemed possible to adopt firmer wording in guideline 3.2.3: there is no doubt that contracting States or contracting organizations have a general duty to cooperate with the treaty monitoring bodies that they have established – which is what is evoked by the expression "shall give consideration" in the first part of the guideline. Of course, if such bodies have been vested with decision-making power the parties must respect their decisions, but this is currently not the case in practice except for some regional human rights courts.[1855] In contrast, the other monitoring bodies lack any juridical decision-making power, either in the area of reservations or in other areas in which they possess declaratory powers.[1856] Consequently, their conclusions are not legally binding, and States parties are obliged only to "take account" of their assessments in good faith.

(4) Of course, it is incumbent upon monitoring bodies to take account of the positions expressed by States and international organizations with respect to the reservation.

3.2.4 Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body

When a treaty establishes a treaty monitoring body, the competence of that body is without prejudice to the competence of the contracting States or contracting organizations to assess the permissibility of reservations to that treaty, or to that of dispute settlement bodies competent to interpret or apply the treaty.

Commentary

(1) Guideline 3.2.4 further clarifies, from a particular angle and in the form of a "without prejudice" clause, the principle established in guideline 3.2 of the plurality of bodies competent to assess the permissibility of reservations.

(2) It should also be noted that the wording of guideline 3.2 takes up only part of the substance of paragraph 6 of the preliminary conclusions of 1997:[1857] it lists the persons or

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[1852] See paragraph (6) of the commentary to guideline 3.2 above; see also the second report on reservations to treaties (A/CN.4/477/Add.1), paras. 206–209. In the same sense, see, *inter alia*, F. Coulée, footnote 1583 above, p. 504 and pp. 512–518).

[1853] See the second paragraph of guideline 3.2.1.

[1854] See paragraph 10 of the preliminary conclusions (see footnote 1799 above) and the second report on reservations to treaties (A/CN.4/477/Add.1), paras. 218–230. See also guideline 4.5.3 (Status of the author of an invalid reservation in relation to the treaty) and commentary.

[1855] Given their very specific nature, these bodies — like all dispute settlement bodies — are dealt with in a separate guideline; see guideline 3.2.5 below.

[1856] See paragraph 2 of guideline 3.2.1.

[1857] See footnote 1799 above.

institutions competent to rule on the permissibility of reservations but does not specify that such powers are cumulative and not exclusive of each other. The Commission considered it useful to spell that point out in a separate guideline.

(3) As in the case of guideline 3.2.3, the monitoring bodies in question are those established by a treaty,[1858] not dispute settlement bodies whose competence in this area forms the subject matter of guideline 3.2.5.

3.2.5 Competence of dispute settlement bodies to assess the permissibility of reservations

When a dispute settlement body is competent to adopt decisions binding upon the parties to a dispute, and the assessment of the permissibility of a reservation is necessary for the discharge of such competence by that body, such assessment is, as an element of the decision, legally binding upon the parties.

Commentary

(1) The Commission found it necessary to draw a distinction between monitoring bodies in the strict sense, which have no decision-making power and whose competence to assess the permissibility of reservations forms the subject matter of guideline 3.2.3, and dispute settlement bodies that have been vested with decision-making power. Even though the regional human rights courts may in a broader sense be considered monitoring bodies, they are included in the second category because their decisions constitute *res judicata*. Such bodies also include those which, like the International Court of Justice, have general competence to settle disputes between States and which, in the event of a dispute involving a potentially broader subject matter, may be called upon to rule on the permissibility of a reservation.

(2) The clarification that their assessment of the permissibility of a reservation "is, as an element of the decision, legally binding upon the parties" indicates that the principle established by the guideline applies not only to cases in which the dispute has a direct bearing on this question, but also to those cases, much more frequent, in which the permissibility of the reservation constitutes a related problem that must be resolved first so that the broader dispute submitted to the competent body can be settled.

(3) It goes without saying that in any event the assessment of the dispute settlement body only has the authority of *res judicata*[1859] if the body in question has the power to render such a judgement.

3.3 Consequences of the non-permissibility of a reservation

3.3.1 Irrelevance of distinction among the grounds for non-permissibility

A reservation formulated notwithstanding a prohibition arising from the provisions of the treaty or notwithstanding its incompatibility with the object and purpose of the treaty is impermissible, without there being any need to distinguish between the consequences of these grounds for non-permissibility.

[1858] See, however, footnote 1845 above.

[1859] Or "finding", if it is assumed that a non-judicial body may, in the exercise of its competence, be called upon to assess the permissibility of a reservation.

Commentary

(1) Guideline 3.3.1 establishes the unity of the rules applicable to the consequences of the non-permissibility of a reservation, whatever the reason for such non-permissibility, among those set out in guideline 3.1.[1860]

(2) Just as it does not specify the consequences of the formulation of a reservation prohibited, either expressly (subparagraph (a)) or implicitly (subparagraph (b)), by the treaty to which it refers, so article 19 of the Vienna Conventions makes no reference to the effects of the formulation of a reservation prohibited by subparagraph (c),[1861] and nothing in the text of the Vienna Convention indicates how these provisions relate to those of article 20, concerning acceptance of reservations and objections. The question has been raised as to whether this "normative gap"[1862] may not have been deliberately created by the authors of the Convention.[1863]

(3) It must in any case be acknowledged that the *travaux préparatoires* of subparagraph (c) are confused and do not offer any further indications of the consequences that the drafters of the Convention intended to draw from the incompatibility of a reservation with the object and purpose of the Convention:[1864]

- In draft article 17 proposed by Waldock in 1962, the object and purpose of the treaty appeared only to function as guidance for the reserving State itself;[1865]
- The debates on that draft were particularly confused during the Commission's plenary meetings[1866] and, more than anything else, revealed a split between members who advocated an individual assessment by States and those who were in favour of a collegial mechanism,[1867] although the consequences of such assessment were not really discussed;
- However, after the Drafting Committee had recast the draft along lines very close to the wording of the present article 19, the overriding feeling seems to have been that the object and purpose constituted a criterion by which the permissibility of the reservation should be assessed.[1868] This is attested by the new amendment to article 18 *bis*, which entailed, on the one hand, the inclusion of the criterion of incompatibility and, on the other hand, and most importantly, the modification of the title of that provision, which became "The legal effect of reservations" instead of "The validity of reservations",[1869]

[1860] For a critical assessment of these guidelines in their 2010 version, see B. Simma and G.I. Hernandéz, footnote 1614 above, pp. 73–75.

[1861] *Cf.* D.W. Greig, footnote 28 above, p. 83.

[1862] F. Horn, footnote 25 above, p. 131; see also J. Combacau, footnote 1833 above, p. 199.

[1863] See P.-H. Imbert, footnote 25 above, pp. 137–140.

[1864] It should be recalled that this criterion was included in the draft belatedly, going back only to Waldock's first report in 1962 (A/CN.4/144, *Yearbook ... 1962*, vol. II, pp. 66–67, para. 10); see also the oral presentation by Waldock, *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 139, paras. 4–6.

[1865] Article 17, para. 2 (a): see *ibid.*; see also the remarks by the Special Rapporteur at the fourteenth session (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, para. 85).

[1866] See *Yearbook ... 1962*, vol. I, pp. 139–168 and pp. 172–175.

[1867] See paragraph (3) of the commentary to guideline 3.2.

[1868] See in particular *Yearbook ... 1962*, vol. I, pp. 225–234. During the discussion on new article 18 *bis*, entitled "The validity of reservations", all the members referred to the criterion of compatibility with the object and purpose of the treaty, which was not mentioned, however, in the draft adopted by the Drafting Committee.

[1869] *Ibid.*, vol. I, pp. 252–253.

which suggests that the validity of reservations was the subject of draft article 17 (which became article 19 of the Convention);

- The deft wording of the commentary to draft articles 18 and 20 (corresponding respectively to articles 19 and 21 of the Convention) adopted in 1962 leaves the question open: it affirms both that the compatibility of the reservation with the object and purpose of the treaty is the criterion governing the formulation of reservations and that, since this criterion "is to some extent a matter of subjective appreciation ... the only means of applying it in most cases will be through the individual State's acceptance or rejection of the reservation", but only "in the absence of a tribunal or an organ with standing competence";[1870]

- In his 1965 report, the Special Rapporteur also noted, in connection with draft article 19 relating to treaties that are silent on the question of reservations (subsequently, article 20 of the Convention), that "the Commission recognized that the 'compatibility' criterion is to some extent subjective and that views may differ as to the compatibility of a particular reservation with the object and purpose of a given treaty. In the absence of compulsory adjudication, on the other hand, it felt that the only means of applying the criterion is through the individual State's acceptance or rejection of the reservation"; it also recognized that "the rules proposed by the Commission might be more readily acceptable if their interpretation and application were made subject to international adjudication";[1871]

- The Commission's commentaries to draft articles 16 and 17 (which subsequently became 19 and 20 respectively) are not as clear, however, and merely state that "the admissibility or otherwise of a reservation under paragraph (c) ... is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States" and that, for that reason, draft article 16 (c) should be understood "in close conjunction with the provisions of article 17 regarding acceptance of and objection to reservations";[1872]

- At the Vienna Conference, some delegations tried to give more content to the criterion of the object and purpose of the treaty. Accordingly, the Mexican delegation proposed that the consequences of a judicial decision recognizing the incompatibility of a reservation with the object and purpose of the treaty should be spelled out.[1873] However, it was mainly those in favour of a system of collegial assessment who tried to draw concrete conclusions from the incompatibility of a reservation with the object and purpose of the treaty.[1874]

(4) Moreover, nothing in the text of article 19 gives grounds for thinking that a distinction should be made between the different cases: *ubi lex non distinguit, nec nos distinguere debemus*. In all three cases, as clearly emerges from the *chapeau* of article 19, a State is

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[1870] *Ibid.*, vol. II, p. 181, para. 22.

[1871] Sir Humphprey Waldock's fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, p. 52, para. 9.

[1872] *Yearbook ... 1966*, vol. II, p. 207, para. 17.

[1873] *First Session, Summary Records*, A/CONF.39/11, footnote 35 above, Plenary Commission, 21st meeting, 10 April 1968, para. 63. Mexico proposed two solutions. The first was that the State that had formulated the incompatible reservation should be obliged to withdraw it, failing which it should forfeit the right to become a party to the treaty; and the second was that the treaty in its entirety should be deemed not to be in force between the reserving State and the objecting State.

[1874] See in particular the statements of the various delegations cited above, commentary to guideline 3.2, para. (3) (footnotes 1808 to 1812 above).

prevented from formulating a reservation and, once it is accepted that a reservation prohibited by the treaty is null and void by virtue of subparagraphs (a) and (b) of article 19, there is no reason to draw a different conclusion from subparagraph (c). Three objections, of unequal weight, have nevertheless been raised to this conclusion.

(5) First, it has been pointed out that, whereas the depositaries reject reservations prohibited by the treaty, they communicate to other contracting States the text of those that are, *prima facie*, incompatible with its object and purpose.[1875] Such is indeed the practice followed by the Secretary-General of the United Nations,[1876] but its significance is only relative. For "only *if there is no doubt* that the statement accompanying the instrument is an unauthorized reservation does the Secretary-General refuse the deposit ... *In case of doubt*, the Secretary-General shall request clarification from the State concerned ... However, the Secretary-General feels that *it is not incumbent upon him to request systematically such clarifications*; rather, it is for the States concerned to raise, if they so wish, objections to statements which they would consider to constitute unauthorized reservations".[1877] In other words, the difference noted in the practice of the Secretary-General is not based on the distinction between the situations in subparagraphs (a) and (b) on the one hand and subparagraph (c) on the other of article 19, but on the certainty that the reservation is contrary to the treaty. When an interpretation is necessary, the Secretary-General relies on States; such is always the case when the reservation is incompatible with the object and purpose of the treaty; it may also be so when the reservations are expressly or implicitly prohibited.

(6) Secondly, it has been pointed out in the same spirit that in the situation in subparagraphs (a) and (b), the reserving State could not be unaware of the prohibition and that, for that reason, it should be assumed to have accepted the treaty as a whole, notwithstanding its reservation (doctrine of "severability").[1878] There is no doubt that it is less easy to determine objectively that a reservation is incompatible with the object and purpose of a treaty than it is when there is a prohibition clause. The remark is certainly relevant, but not decisive. It is less easy than is sometimes thought to determine the scope of reservation clauses, especially when the prohibition is implicit, as in the situation in subparagraph (b).[1879] Furthermore, it may be difficult to determine whether or not a unilateral statement is a reservation, and the State concerned may have thought in good faith that it had not violated the prohibition, while considering that its consent to be bound depended on the acceptance of its interpretation of the treaty.[1880] In fact, if a State is assumed not to be ignorant of the prohibition resulting from a reservation clause, it should be equally aware that it cannot divest a treaty of its substance through a reservation that is incompatible with the treaty's object and purpose.

(7) Thirdly and most significantly, it has been argued that paragraphs 4 and 5 of article 20 mention just one limitation on the possibility of accepting a reservation: that is, when the treaty contains a contrary provision.[1881] *A contrario*, that would imply complete freedom to

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[1875] *Cf.* G. Gaja, footnote 28 above, p. 317.

[1876] See *Summary of Practice of the Secretary-General...*, footnote 75 above, paras. 191 and 192.

[1877] *Ibid.*, paras. 194–196, emphasis added. The practice followed by the Secretary-General of the Council of Europe is similar, except that, in the event of difficulty, he or she may consult (and does consult) the Committee of Ministers (see J. Polakiewicz, footnote 638 above, pp. 90–93).

[1878] See A. Fodella, footnote 1502 above, pp. 143–147.

[1879] See in particular the commentary to guideline 3.1.2 (Definition of specified reservations).

[1880] On the distinction between reservations, on the one hand, and interpretative declarations, whether simple or conditional, on the other, see guidelines 1.3 to 1.3.3 and commentaries.

[1881] The wording used in both provisions is "unless the treaty otherwise provides".

accept reservations, notwithstanding the provisions of article 19, subparagraph (c).[1882] While it is true that, in practice, States object infrequently to reservations that are very possibly contrary to the object and purpose of the treaty to which they relate and that, in consequence, the rule contained in article 19, subparagraph (c),[1883] is deprived of concrete effect, at least in the absence of a body competent to take decisions in that regard,[1884] many arguments based on the text of the Convention itself conflict with that reasoning:

- Articles 19 and 20 of the Convention have distinct purposes; the rules that they establish are applicable at different stages of the formulation of a reservation: article 19 sets out the cases in which a reservation may not be formulated; article 20 describes what happens after one has been formulated;[1885]
- The proposed interpretation would strip article 19, subparagraph (c), of any real effect: in consequence, a reservation incompatible with the object and purpose of the treaty would have exactly the same effect as a compatible reservation;
- It would also render meaningless article 21, paragraph 1, which stipulates that a reservation is "established" only "in accordance with articles 19, 20 and 23";[1886] and
- It introduces a distinction between the scope of article 19, subparagraphs (a) and (b), on the one hand and article 19, subparagraph (c), on the other, which the text in no way authorizes.[1887]

(8) Consequently, there is nothing in the text of article 19 of the Vienna Conventions, or in its context, or even in the practice of States or depositaries to justify drawing such a distinction between the consequences of the formulation of a reservation in spite of a treaty-based prohibition (article 19 (a) and (b)), on the one hand, and of its incompatibility with the object and purpose of the treaty (article 19 (c)), on the other.

3.3.2 Non-permissibility of reservations and international responsibility

The formulation of an impermissible reservation produces its consequences pursuant to the law of treaties and does not engage the international responsibility of the State or international organization which has formulated it.

Commentary

(1) Once it has been accepted that, in accordance with guideline 3.3.1, the three subparagraphs of article 19 (reproduced in guideline 3.1) have the same function and that a reservation that is contrary to their provisions is impermissible, it still remains to be seen what happens when, in spite of these prohibitions, a State or an international organization formulates a reservation. If it does so, the reservation certainly cannot have the legal effects

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[1882] See D.W. Greig, footnote 25 above, pp. 83–84.

[1883] See, in particular, D. Carreau, *Droit international* (Pedone, 2004), p. 137; Gaja, footnote 28 above, pp. 315–318; D.W. Greig, footnote 25 above, pp. 86–90 or P.-H. Imbert, footnote 25 above, pp. 134–137.

[1884] See paragraphs (8) and (9) of the commentary to guideline 3.2 (Assessment of the permissibility of a reservation); see also M. Coccia, footnote 196 above, p. 33, or R. Szafarz, footnote 27 above, p. 301.

[1885] See Bowett, footnote 155 above, p. 80; or C.J. Redgwell, "Reservations to treaties and Human Rights Committee general comment No. 24 (52)", *I.C.L.Q.*, vol. 46 (1997), pp. 404–406.

[1886] See paragraph (6) of the commentary to guideline 3.1 and the commentary to guideline 4.1.

[1887] See paragraph (4) above.

which, pursuant to article 21, are clearly contingent on its "establishment" "in accordance with articles 19 [in its entirety], 20 and 23".[1888]

(2) Whatever its effects,[1889] questions remain: on the one hand, should it be concluded that, by proceeding thus, the author of the reservation is committing an internationally wrongful act which engages its international responsibility? And further, are other parties prevented from accepting a reservation formulated in spite of the prohibitions contained in article 19?

(3) With regard to the first of these two questions,[1890] it has been argued that a reservation that is incompatible with the object and purpose of the treaty[1891] "amounts to a breach of [the] obligation" arising from article 19, subparagraph (c). "Therefore, it is a wrongful act, entailing such State's responsibility *vis-à-vis* each other party to the treaty. It does not amount to a breach of the treaty itself, but rather of the general norm embodied in the Vienna Convention forbidding 'incompatible' reservations."[1892] This reasoning, based expressly on the rules governing the responsibility of States for internationally wrongful acts,[1893] is not entirely convincing.[1894]

(4) It is clear that "[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character",[1895] and that a breach of an obligation not to act (which in this case would be the obligation not to formulate a reservation which is incompatible with the object and purpose of the treaty) is an internationally wrongful act liable to engage the international responsibility of a State in the same way as an obligation to act. However, the question would have to be posed in the sphere of the law of responsibility. As the International Court of Justice forcibly recalled in the case concerning the *Gabčikovo-Nagymaros Project*, the law of responsibility and the law of treaties "obviously have a scope that is distinct"; while "a determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties",[1896] it falls to this same branch of law to determine whether or not a reservation may be formulated. It follows, at the very least, that the potential responsibility of a reserving State cannot be

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[1888] Article 21 (Legal effects of reservations and of objections to reservations): "A reservation established with regard to another party in accordance with articles 19, 20 and 23 ...".

[1889] These will form the subject of Part 4 of the Guide to Practice.

[1890] See also paragraphs (2) to (7) of the general commentary to Part 3 of the Guide to Practice.

[1891] This should also hold true *a fortiori* for reservations prohibited by the treaty.

[1892] M. Coccia, footnote 196 above, pp. 25–26.

[1893] See articles 1 and 2 of the Commission's articles on responsibility of States for internationally wrongful acts, General Assembly resolution 56/83 of 12 December 2001, annex.

[1894] See G. Gaja, footnote 28 above, p. 314, note 29.

[1895] Article 12 of the articles on responsibility of States for internationally wrongful acts.

[1896] Judgment of 25 September 1997, *Gabčikovo-Nagymaros Project* case, *I.C.J. Reports 1997*, p. 38, para. 47; see also the arbitral ruling of 30 April 1990 in the *Rainbow Warrior* case, *Revue générale de droit international public*, 1990, p. 851, para. 75. On the relationships between the two branches of law, see in particular D. Bowett, "Treaties and State responsibility", *Le droit international au service de la paix, de la justice et du développement – Mélanges Michel Virally* (Paris, Pedone, 1991), pp. 137–145; J. Combacau, footnote 1833 above, pp. 195–203; P.-M. Dupuy, "Droit de traités, codification et responsabilité internationale", *Annuaire français de droit international*, 1997, pp. 7–30; Ph. Weckel, "Convergence du droit des traités et du droit de la responsabilité internationale", *Revue générale de droit international public*, 1998, pp. 647–684; P. Weil, "Droit de traités et droit de la responsabilité", *Le droit international dans un monde en mutation* – Liber Amicorum *Jiménez de Aréchaga* (Montevideo, FCU, 1994), pp. 523–543; A. Yahi, "La violation d'un traité: L'articulation du droit des traités et du droit de la responsabilité internationale", *Revue belge de droit international*, 1993, pp. 437–469.

determined under the Vienna rules and that it is not pertinent to the "law of reservations". Furthermore, even if injury is not a requirement for engaging the responsibility of a State,[1897] it influences how that responsibility is realized, particularly with regard to reparation;[1898] hence, for an impermissible reservation to have concrete consequences in the sphere of the law of responsibility, a State relying on it would have to be able to invoke an injury – which is highly unlikely.

(5) There is more, however. It is telling that no State has ever, when formulating an objection to a prohibited reservation, invoked the responsibility of the reserving State. The consequences of the finding that a reservation is not permissible may be varied,[1899] but they never entail an obligation to make reparation, and if an objecting State were to invite the reserving State to withdraw its reservation or to modify it within the framework of the "reservations dialogue", it would be acting not in the sphere of the law of responsibility but in that of the law of treaties alone. There seems to be no doubt, in fact, that the formulation of a reservation excluded by any of the subparagraphs of article 19 falls within the sphere of the law of treaties and not within that of responsibility of States for internationally wrongful acts. Accordingly, it does not entail the responsibility of the reserving State.[1900] While this seems self-evident, the Commission's intention in adopting guideline 3.3.2 was to remove any remaining ambiguity.[1901]

3.3.3 Absence of effect of individual acceptance of a reservation on the permissibility of the reservation

Acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not affect the impermissibility of the reservation.

Commentary

(1) According to the first part of guideline 3.3.1 (Irrelevance of distinction among the grounds for non-permissibility), "a reservation formulated notwithstanding a prohibition arising from the provisions of the treaty or notwithstanding its incompatibility with the object and purpose of the treaty is impermissible". The provision makes it clear that the impermissibility of the reservation results *ipso facto* from one of the grounds listed in article 19 of the Vienna Conventions and reproduced in guideline 3.1. In other words, either the prohibition (explicit or implicit) of the reservation or alternatively its incompatibility with the object and purpose of the treaty constitutes the necessary and sufficient condition for its impermissibility.

[1897] See in this connection article 1 of the Commission's articles on the responsibility of States for internationally wrongful acts (footnote 1893 above).

[1898] *Cf.* articles 31 and 34 of the articles on responsibility of States for internationally wrongful acts.

[1899] They arise, *a contrario*, from article 20 and in particular from article 21 of the Vienna Conventions.

[1900] Much less that of States which implicitly accept a reservation that is prohibited or incompatible with the object and purpose of the treaty — see, however, L. Lijnzaad, footnote 463 above, p. 56: "The responsibility for incompatible reservations is ... shared by reserving and accepting States" — but it appears from the context that the author does not consider either the incompatible reservation or its acceptance as internationally wrongful acts; rather than "responsibility" in the strictly legal sense, it is no doubt necessary to refer here to "accountability" in the sense of having to provide an explanation.

[1901] On the related terminological problems, see para. (6) of the general commentary to Part 3 of the Guide to Practice.

(2) Consequently, it is clear that the acceptance of a reservation by a contracting State or international organization formulated notwithstanding article 19, subparagraphs (a) and (b), cannot cure this impermissibility, which is the "objective" consequence of the prohibition of the reservation or of its incompatibility with the object and purpose of the treaty.[1902] That is what is explained in guideline 3.3.3.

(3) Waldock, in his capacity as Expert Consultant, clearly expressed his support for this solution at the Vienna Conference on the Law of Treaties when he stated that:

> "a contracting State could not purport, under article 17 [current article 20], to accept a reservation prohibited under article 16 [19], paragraph (a) or paragraph (b), because, by prohibiting the reservation, the contracting States would expressly have excluded such acceptance".[1903]

(4) The logical consequence of the "impossibility" of accepting a reservation that is impermissible either under subparagraph (a) or (b) of article 19 (or of guideline 3.1), or under paragraph (c) — which follows exactly the same logic and which there is no reason to distinguish from the other two paragraphs of the provision[1904] — is that such an acceptance is devoid of legal effect.[1905] It cannot "permit" the reservation, nor can it cause the reservation to produce any effect whatsoever – and certainly not the effect envisaged in article 21, paragraph 1, of the Vienna Conventions, which requires that the reservation must have been established.[1906] Furthermore, if the acceptance of an impermissible reservation were considered to constitute an agreement between the author of the impermissible reservation and the State or international organization that accepted it, it would result in a modification of the treaty in the relations between the two parties, a result that would be incompatible with article 41, paragraph 1 (b) (ii), of the Vienna Conventions, which excludes any modification of the treaty if it relates "to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole".[1907]

(5) The Commission decided that this guideline should be included in Part 3 of the Guide to Practice relating to the permissibility of reservations and not in Part 4 concerning their consequences: it is a question of identifying not the effect of acceptance of an impermissible reservation, but rather the effect of acceptance on the permissibility of the reservation itself (an issue which arises earlier in the process than the question of the effect of reservations). Permissibility logically precedes acceptance (the Vienna Conventions also follow this logic) and guideline 3.3.3 relates to the permissibility of the reservation – in other words, to the fact that acceptance cannot cure an absence of permissibility. The aim of the guideline is not to

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[1902] See in this sense A. Pellet and D. Müller, "Reservations to treaties: an objection to a reservation is definitely not an acceptance" in E. Cannizzaro (ed.). *The Law of Treaties beyond the Vienna Convention* (Oxford University Press, 2011), in particular pp. 54–56.

[1903] *First Session. Summary records*, footnote 35 above, 25th meeting, 16 April 1968, p. 133, para. 2.

[1904] See the last part of guideline 3.3.1 (Irrelevance of distinction among the grounds for non-permissibility): "A reservation formulated notwithstanding a prohibition arising from the provisions of the treaty or in spite of its incompatibility with the object and the purpose of the treaty is impermissible, *without there being any need to distinguish between the consequences of these grounds for non-permissibility*."

[1905] See below guideline 4.5.2 (Reactions to a reservation considered invalid) and commentary.

[1906] See guidelines 4.2.1 to 4.2.5 and commentaries below.

[1907] In this sense see D.W. Greig, footnote 28 above, p. 57; or L. Sucharipa-Behrmann, footnote 1621 above, pp. 78–79; *contra*, however, see the comments made by Jiménez de Aréchaga and d'Amado during the discussions on Waldock's proposals of 1962 (*Yearbook … 1962*, vol. I, 653rd meeting, 29 May 1962, p. 158, paras. 44–45 and p. 160, para. 63).

determine the effects of acceptance of a reservation by a State, but simply to establish that, if the reservation in question is impermissible, it remains impermissible despite an acceptance.

(6) Individual[1908] — even express — acceptance of an impermissible reservation has no effect as such on the consequences of this impermissibility, which are outlined in Part 4 of the Guide to Practice. The question of the consequences of acceptance in terms of the effects of the reservation is not and should not be raised; the inquiry stops at the stage of permissibility, which is not and cannot be acquired as a result of the acceptance.

(7) Guideline 3.3.3 establishes that acceptance of an impermissible reservation cannot have any effect either on the permissibility of the reservation or *a fortiori* on the legal consequences that flow from the impermissible reservation. Those consequences are discussed in section 4.5 of the Guide to Practice.

(8) The question remains, however, whether collective acceptance of an otherwise impermissible reservation is possible.

(9) Draft article 17 (1) (b) proposed by Waldock in 1962 envisaged "the exceptional case of an attempt to formulate a reservation of a kind which is actually prohibited or excluded by the terms of the treaty";[1909] he proposed that, in such case, "the prior consent of all the other interested States" is required.[1910] This provision was not retained in the Commission's draft articles of 1962[1911] or 1966 and does not appear in the Convention.[1912]

(10) It can be argued, however, that the parties always have a right to amend the treaty by general agreement *inter se* in accordance with article 39 of the Vienna Conventions and that nothing prevents them from adopting a unanimous agreement[1913] to that end on the subject of

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[1908] The term "individual acceptance" is also used in guideline 2.8.10 to refer to the acceptance of a reservation to the constituent instrument of an international organization by a State or an international organization as opposed to acceptance by the competent body of the organization in question. The problem is different when there is collective acceptance of a reservation by all contracting States and contracting international organizations; on this point see paragraphs (8) to (13) below.

[1909] First report on the law of treaties, A/CN.4/144, in *Yearbook ... 1962*, vol. II, p. 65, para. (9).

[1910] See *ibid.*, p. 60, for the text of the draft article.

[1911] The provision came up against opposition from Mr. Tunkin (*ibid.*, vol. I, 651st meeting, 25 May 1962, para. 19) and Mr. Castrén (*ibid.*, para. 68, and 652nd meeting, 28 May 1962, para. 30), who believed it to be superfluous, and it disappeared from the simplified draft retained by the Drafting Committee (*ibid.*, 663rd meeting, 18 June 1962, para. 3).

[1912] This solution was, however, adopted in the reservation clause of the European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport of 1 July 1970, of which article 21, para. 2 provides as follows: "If at the time of depositing its instrument of ratification or accession a State enters a reservation other than that provided for in paragraph 1 of this article, the Secretary-General of the United Nations shall communicate the reservation to the States which have previously deposited their instruments of ratification or accession and have not since denounced this Agreement. The reservation shall be deemed to be accepted if none of the said States has, within six months after such communication, expressed its opposition to acceptance of the reservation. Otherwise the reservation shall not be admitted, and, if the State which entered the reservation does not withdraw it the deposit of that State's instrument of ratification or accession shall be without effect." On the basis of this provision and in the absence of an objection from the other States parties to the Convention, the States members of the European Economic Community formulated a reservation, not authorized by the Agreement, excluding the application of the agreement to certain operations. See the reservations made by the States which, at the time, were members of the Community, *Multilateral Treaties* ..., chap. XI.B.21.

[1913] But not an agreement between certain of the parties only; see article 41 of the Vienna Conventions.

reservations.[1914] This possibility, which accords with the principle of consent that underpins all the law of treaties, nevertheless poses some very difficult problems. The first problem is whether the absence of objections by all the other parties within a 12-month period is equivalent to a unanimous agreement constituting an amendment to the reservation clause. At first sight, article 20, paragraph 5, of the Convention seems to answer this in the affirmative.

(11) However, after further consideration, this is not necessarily the case: silence on the part of a State party does not necessarily mean that it is taking a position as to the permissibility of the reservation; at most, it means that the reservation may be invoked against it[1915] and that the State undertakes not to object to it in the future.[1916] This is shown by the fact that it cannot be argued that monitoring bodies — whether the International Court of Justice, an arbitral tribunal or a human rights treaty body — are prevented from assessing the permissibility of a reservation even if no objection has been raised to it.[1917]

(12) An example could be cited, however, in support of the opposite: the well-known neutrality reservation formulated by Switzerland upon acceding to the Covenant of the League of Nations. Even though the Covenant prohibited reservations, the reserving State was admitted into the circle of States parties.[1918] This "precedent"[1919] certainly does not, however, help to prove the existence of a customary norm along those lines.

(13) In the absence of a well-established rule, the Commission considered that it was better not to take a position on the question, which, in any event, has more to do with the general problem of the amendment or modification of treaties than that of reservations *stricto sensu*.[1920]

3.4 Permissibility of reactions to reservations

Commentary

(1) Unlike the case of reservations, the Vienna Conventions do not set forth any criteria or conditions for the permissibility of reactions to reservations, although acceptances and

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[1914] In this regard, see D.W. Greig, footnote 25 above, pp. 56–57; or L. Sucharipa-Behrman, footnote 1621 above, p. 78. This is also the position of D.W. Bowett, but he considers that this possibility does not come under the law of reservations (footnote 150 above, p. 84; see also C. Redgwell, footnote 1131 above, p. 269). Moreover, it cannot reasonably be argued that the rules established in article 19, and in particular subparagraph (c), constitute peremptory norms of general international law from which the parties may not derogate by agreement.

[1915] In this regard, see M. Coccia, footnote 195 above, p. 26; F. Horn, footnote XXX above, pp. 121–131; or Karl Zemanek, "Some unresolved questions concerning reservations in the Vienna Convention on the Law of Treaties", *Essays in International Law in Honour of Judge Manfred Lachs* (The Hague, Nijhoff, 1984), pp. 331–332; see also G. Gaja, footnote 28 above, pp. 319–320. As Liesbeth Lijnzaad quite rightly points out, it is not a question of acceptance *stricto sensu*, "it is the problem of inactive States whose laxity leads to the acceptance of reservations contrary to object and purpose" (footnote 463 above, p. 56).

[1916] See guideline 2.8.13 and commentary.

[1917] See D.W. Greig, footnote 28 above, pp. 57–58. Even during the Commission's debate in 1962, Bartoš had made the point that it was almost inconceivable that the simple operation of time limits for the making of objections could mean that a clearly inadmissible reservation "could no longer be challenged" (*Yearbook … 1962*, vol. I, 654th meeting, 30 May 1962, p. 163, para. 29).

[1918] See M.H. Mendelson, footnote 1338 above, pp. 140–141.

[1919] Not an exact precedent, since, strictly speaking, it was not a case of unanimous acceptance by the parties to the Covenant but rather acceptance by the organization itself.

[1920] In this sense see D.W. Bowett, footnote 150 above, p. 84.

objections occupy a substantial place as a means for States and international organizations to give or refuse their consent to a permissible reservation. Such reactions do not, however, constitute criteria for the permissibility of a reservation that can be evaluated objectively in accordance with the conditions established in article 19 of the Vienna Conventions and independently of the acceptances or objections to which the reservation has given rise. They are a way for States and international organizations to express their point of view regarding the permissibility of a reservation, but the permissibility (or impermissibility) of a reservation must be evaluated independently of the acceptances or objections to which it gave rise. Moreover, this idea is clearly expressed in section 3.3 (Consequences of the non-permissibility of a reservation). However, that acceptances and objections provide a means for States and international organizations to express their point of view regarding the permissibility of a reservation, and they may accordingly be taken into account in assessing the permissibility of a reservation.[1921]

(2) The *travaux préparatoires* of the Vienna regime in respect of objections leave no doubt as to the lack of connection between the permissibility of a reservation and the reactions thereto.[1922] It also follows that while it may be appropriate to refer to the "permissibility" of an objection or acceptance, the term does not have the same connotation as in the case of reservations themselves. The main issue is whether the objection or acceptance can produce its full effects.

3.4.1 Permissibility of the acceptance of a reservation

Acceptance of a reservation is not subject to any condition of permissibility.

Commentary

(1) It seems self-evident that contracting States or international organizations can freely accept a reservation that is permissible and that the permissibility of such acceptances cannot be questioned.[1923] It is not clear whether it is a different matter when a State or an international organization accepts a reservation that is impermissible.

(2) While acceptance cannot determine the permissibility of a reservation, some authors have argued that the converse is not true:

> "An acceptance of an inadmissible reservation is theoretically not possible. Directly or indirectly prohibited reservations under article 19 (1) (a) and (b) cannot be accepted by any confronted state. Such reservations and acceptances of these will not have any legal effects. (…) Similarly, an incompatible reservation under article 19 (1) (c) should be regarded as incapable of acceptance and as *eo ipso* invalid and without any legal effect."[1924]

(3) The Commission, however, has not taken that view. Although this statement in the literature may not be debatable as far as it goes, there is no need to conclude that acceptance of an impermissible reservation is in turn and *ipso facto* impermissible. It would seem more accurate to say that it simply cannot produce the legal effects that its author expected to produce. The reason for the absence of effects is not the impermissibility of the acceptance but

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[1921] See the commentary to guideline 4.5.2 below.

[1922] See paragraphs (4)–(6) of the commentary to guideline 2.6.2 above.

[1923] See guideline 4.1 and commentary below. See also the commentary to guideline 2.8.3 (Express acceptance of reservations).

[1924] See F. Horn, footnote 25 above, p. 121.

the impermissibility of the reservation. The acceptance as such cannot be said to be either permissible or impermissible.

(4) In any case, only express acceptances could conceivably have been subject to conditions of permissibility, since it is difficult to envisage a regime of impermissibility for a non-existent act, such as a tacit acceptance. Now, it is hard to imagine that there could be a regime of permissibility for express acceptances and another for tacit acceptances, since that would run counter to the 1969 and 1986 Vienna Conventions, which place them on the same plane.

(5) For these reasons the Commission considers that acceptance is not subject to any condition of permissibility. This position is without prejudice to the absence of effect of the individual acceptance of a reservation on the latter's permissibility.[1925]

3.4.2 Permissibility of an objection to a reservation

An objection to a reservation by which a State or an international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty to which the reservation does not relate is only permissible if:

(1) the provisions thus excluded have a sufficient link with the provisions to which the reservation relates; and

(2) the objection would not defeat the object and purpose of the treaty in the relations between the author of the reservation and the author of the objection.

Commentary

(1) Guideline 3.4.2 relates solely to a very particular category of objections, frequently called those with "intermediate effect", through which a State or international organization considers that treaty relations should be excluded beyond what is provided for in article 21, paragraph 3, of the Vienna Conventions, yet does not oppose the entry into force of the treaty between itself and the author of the reservation. The Commission has noted the existence of such objections, which might be called objections of the "third type", in the commentary to guideline 2.6.1 on the definition of objections to reservations, without taking a position on their permissibility.[1926]

(2) While treaty practice provides relatively few specific examples of intermediate-effect or "extensive" objections, some do exist. It would seem, however, that this "*nueva generación*"[1927] ["new generation"] of objections developed exclusively around certain reservations to the 1969 Vienna Convention itself: some States agreed that the Convention could enter into force between themselves and the authors of the reservations, provided that not only the provisions to which the reservations in question had been made,[1928] but also

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[1925] See guidelines 3.3.3 (Absence of effect of individual acceptance of a reservation on the permissibility of the reservation) and 4.5.2 (Reactions to a reservation considered invalid).

[1926] See paragraph (23) of the commentary to guideline 2.6.1.

[1927] R. Riquelme Cortado, footnote 150 above, p. 293.

[1928] As a general rule, article 66 of the Convention and the annex thereto (see the reservations formulated by Algeria (*Multilateral Treaties* ..., chap. XXIII.1), Belarus (*ibid.*), Cuba (*ibid.*), Guatemala (*ibid.*), the Russian Federation (*ibid.*), the Syrian Arab Republic (*ibid.*), Tunisia (*ibid.*), Ukraine (*ibid.*) and Viet Nam (*ibid.*). Bulgaria, the Czech Republic, Hungary and Mongolia had formulated similar reservations but withdrew them in the early 1990s (*ibid.*). The German Democratic Republic had also formulated a reservation excluding the application of article 66 (*ibid.*).

other articles related to them were excluded.[1929] These objections thus had a much broader scope than that of objections with "minimum effect", yet the authors of the objections did not go so far as to state that they were not bound by the treaty *vis-à-vis* the author of the reservation. While a number of States parties to the Vienna Convention objected to such reservations but limited their objections to the "presumed" effects envisaged in article 21, paragraph 3, of the 1969 Vienna Convention,[1930] other States — Canada,[1931] Egypt,[1932] Japan,[1933] the Netherlands,[1934] New Zealand,[1935] Sweden,[1936] the United Kingdom[1937] and the United States[1938] — wanted their objections to produce more serious consequences but did not wish to exclude the entry into force of the Vienna Convention as between themselves and the reserving States.[1939] The latter States not only wanted to exclude the application of the obligatory dispute settlement provision or provisions "to which the reservation refers"; they also did not consider themselves bound in their bilateral relations with the reserving State by the substantive provisions to which the dispute settlement procedure or procedures applied. For example, the United States, in its objection to Tunisia's reservation to article 66 (a) of the Vienna Convention, stated that:

[1929] These are the other provisions in Part V of the Vienna Convention, in particular article 64 on *jus cogens* (arts. 53 and 64). See also para. (9) below.

[1930] That was the case with Denmark and Germany (*ibid.*).

[1931] In respect of the reservation by the Syrian Arab Republic (*ibid.*).

[1932] Egypt's objection was directed not at one reservation in particular, but at any reservation excluding the application of article 66 (*ibid.*).

[1933] In respect of any reservation excluding the application of article 66 or the annex to the Vienna Convention (*ibid.*).

[1934] In respect of all States that had formulated reservations concerning the compulsory dispute settlement procedures. This general declaration was reiterated separately for each State that had formulated such a reservation (*ibid.*).

[1935] In respect of Tunisia's reservation (*ibid.*).

[1936] In respect of any reservation excluding application of the dispute settlement provisions, in general, and of the reservations made by Cuba, the Syrian Arab Republic and Tunisia, in particular (*ibid.*).

[1937] To the extent set out in its declaration of 5 June 1987, except in respect of Viet Nam's reservation.

[1938] The United States objections were formulated before it became a contracting party and concerned the reservations made by the Syrian Arab Republic, Tunisia and Cuba (*ibid.*).

[1939] The United Kingdom made maximum-effect objections, in due and proper form, to the reservations formulated by the Syrian Arab Republic and Tunisia. The effect of these objections seems, however, to have been mitigated *a posteriori* by the United Kingdom's declaration of 5 June 1987, which constituted in a sense the partial withdrawal of its earlier objection (see guideline 2.7.7 and commentary), since the author did not oppose the entry into force of the Convention as between the United Kingdom and a State that had made a reservation to article 66 or to the annex to the Vienna Convention and excluded only the application of Part V in their treaty relations. This declaration, which the United Kingdom recalled in 1989 (with regard to Algeria's reservation) and 1999 (with regard to Cuba's reservation), stated that "[w]ith respect to any other reservation the intention of which is to exclude the application, in whole or in part, of the provisions of article 66, to which the United Kingdom has already objected or which is made after the reservation by [the USSR], the United Kingdom will not consider its treaty relations with the State which has formulated or will formulate such a reservation as including those provisions of Part V of the Convention with regard to which the application of article 66 is rejected by the reservation" (*ibid.*). Nevertheless, in 2002, the United Kingdom again objected with maximum effect to the reservation made by Viet Nam by excluding all treaty relations with Viet Nam (*ibid.*). New Zealand also chose to give its objection to the Syrian reservation maximum effect (*ibid.*).

> "The United States Government intends, at such time as it becomes a party to the Convention, to reaffirm its objection […] and declare that it will not consider that article 53 or 64 of the Convention is in force between the United States of America and Tunisia."[1940]

(3) While the 1969 and 1986 Vienna Conventions do not expressly authorize objections with intermediate effect, nothing in the two Conventions prohibits them. On the contrary, objections with intermediate effect, as their name indicates, may be entertained in that they fall midway between the two extremes envisaged under the Vienna regime: they purport to prohibit the application of the treaty to an extent greater than a minimum-effect objection (article 21, paragraph 3, of the Vienna Conventions), but less than a maximum-effect objection (article 20, paragraph 4 (b), of the Vienna Conventions).[1941]

(4) Although in principle, "a State or international organization may formulate an objection to a reservation irrespective of the permissibility of the reservation",[1942] the question remains whether objections with intermediate effect must in some cases be deemed to be impermissible.

(5) Some authors propose to consider that "these extended objections are, in fact, reservations (limited *ratione personae*)".[1943] This analysis is to some extent supported by the fact that other States have chosen to formulate reservations in the strict sense of the word in order to achieve the same result.[1944] Thus, Belgium formulated a (late) reservation concerning the Vienna Convention, stating that:

> "The Belgian State will not be bound by articles 53 and 64 of the Convention with regard to any party which, in formulating a reservation concerning article 66 (2), objects to the settlement procedure established by this article."[1945]

As one author has written:

> "As a partial rejection modifies the content of the treaty in relation to the reserving State to an extent that exceeds the intended effect of the reservation, acceptance or acquiescence on the part of the reserving State appear to be necessary for a partial rejection to take its effect; failing this, no relations under the treaty are established between the reserving State and an objecting State which partially rejects those relations."[1946]

(6) This approach has been disputed on the grounds that, by adhering to the letter of the definition of reservations,[1947] the objecting State, which typically formulates its objection only after having become a party to the treaty, would be prevented from doing so within the

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[1940] *Ibid.*

[1941] See D. Müller, "Article 21", footnote 49 above, pp. 925–926, paras. 67–69; D. Müller, 1969 Vienna Convention Article 21, footnote 49 above, pp. 560–561, para. 56.

[1942] Guideline 2.6.2 (Right to formulate objections).

[1943] See, *inter alia*, J. Sztucki, "Some questions arising from reservations to the Vienna Convention on the Law of Treaties", *German Yearbook of International Law*, 1977, p. 297. The author suggests that such declarations should be viewed as "objections only to the initial reservations and own reservations of the objecting States in the remaining part" (*ibid.*, p. 291).

[1944] Belgium's reservation quoted below is quite similar in spirit, purpose and technique to conditional objections (see paragraphs (29) to (34) of the commentary to guideline 2.6.1). See in particular the Chilean objection to the 1969 Vienna Convention, quoted in paragraph (30) of the commentary to guideline 2.6.1.

[1945] *Multilateral Treaties …*, chap. XXIII.1.

[1946] G. Gaja, footnote 28 above, p. 326. See also R. Baratta, footnote 701, p. 385.

[1947] See guideline 1.1 (and article 2, paragraph 1 (b), of the Vienna Conventions).

established time period, and would be faced with the uncertainties that characterize the regime of late reservations.[1948] As a result, unless a "reservations dialogue" were established, the reserving State would not, in principle, be in a position to respond effectively to such an objection. It has also been pointed out that it would be contradictory to make objections with intermediate effect subject to conditions of permissibility while maximum-effect objections are not subject to such conditions, and further that the determination and assessment of the necessary link between the provisions which could potentially be deprived of legal effect by the interaction between the reservation and the extended objection have really more to do with the question of whether or not the objection with intermediate effect can produce the effect intended by its author.[1949]

(7) The Commission was not convinced by this view and considered that objections with intermediate effect, which in some ways constitute "counter-reservations" (but are certainly not reservations strictly speaking), should conform to the conditions of permissibility and formal validity of reservations and, in any event, should not deprive the treaty of its object and purpose, if only because it makes little sense to apply a treaty deprived of its object or purpose. This is what is stated in paragraph 2 of guideline 3.4.2.

(8) That said, it would be unacceptable and entirely contrary to the principle of consent[1950] for States and international organizations to use a reservation as an excuse for attaching intermediate-effect objections of their choosing, thereby excluding any provision that they do not like. A look back at the origins of objections with intermediate effect is revealing in this regard.

(9) As was recalled above,[1951] the practice of making objections with intermediate effect has been manifest mainly, if not exclusively, in the case of reservations and objections to the provisions of Part V of the 1969 Vienna Convention, and the reasons that led the objecting States to resort to them were made very clear. Article 66 of the Vienna Convention and its annex relating to compulsory conciliation provide procedural guarantees which many States, at the time when the Convention was adopted, considered essential in order to prevent abuse of certain provisions of Part V.[1952] This link was stressed by some of the States that formulated objections with intermediate effect in respect of reservations to article 66. For example:

> "The Kingdom of the Netherlands is of the view that the provisions regarding the settlement of disputes, as laid down in article 66 of the Convention, are an important part of the Convention and *cannot be separated* from the substantive rules with which they are connected."[1953]

[1948] See guidelines 2.3 to 2.3.4.

[1949] According to this view, "it is one thing to say that an objection with intermediate effect is not valid and quite another to maintain that such an objection cannot produce the effect intended by its author. Thus, the issue does not bear on the validity of an objection and should therefore be included not in the part of the Guide to Practice on the substantive validity of declarations in respect of treaties, but rather in the part dealing with the effects that an objection with intermediate effect can actually produce" (fourteenth report on reservations to treaties, A/CN.4/614/Add.1, para. 118).

[1950] See in particular the commentary to guideline 3.1.5.2, especially paragraph (3).

[1951] Paragraph (2).

[1952] J. Sztucki, footnote 1943 above, pp. 286 and 287 (see also the references provided by the author).

[1953] Emphasis added – see footnote 1934 above.

The United Kingdom stated even more explicitly that:

> "Article 66 provides in certain circumstances for the compulsory settlement of disputes by the International Court of Justice (...) or by a conciliation procedure (...). These provisions are inextricably linked with the provisions of Part V to which they relate. Their inclusion was the basis on which those parts of Part V which represent progressive development of international law were accepted by the Vienna Conference."[1954]

(10) The reaction of several States to reservations to article 66 of the 1969 Vienna Convention was aimed at safeguarding the package deal which some States had sought to undermine through reservations and which, save through a maximum-effect reservation,[1955] could only be restored through an objection that went beyond the "normal" effects of the reservations envisaged by the Vienna Conventions.[1956]

(11) It is thus clear from the practice concerning objections with intermediate effect that there must be an intrinsic link between the provision which gave rise to the reservation and the provisions whose legal effect is affected by the objection.

(12) After asking itself how best to define this link, and having contemplated calling it "intrinsic", "indissociable" or "inextricable", the Commission finally settled on the word "sufficient", which does not seem contradictory to the words just mentioned but has the merit of showing that the particular circumstances of each case have to be taken into account. Moreover, guideline 3.4.2 probably partakes more of the nature of progressive development of international law than of codification *per se*; the use of the adjective "sufficient" has the merit of leaving room for the clarification that might come from future practice.

(13) Other limitations on the permissibility of objections with intermediate effect have been suggested. It might seem logical to exclude objections aimed at articles to which reservations are not permitted under article 19, subparagraphs (a) and (b), of the Vienna Conventions.[1957] The Commission does not disagree, but such situations are so hypothetical and marginal that it seems unnecessary to address them expressly in guideline 3.4.2.

(14) One might also think that since, according to guideline 4.4.3, paragraph 2, "[a] reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law", the same principle should apply to objections with intermediate effect. However, the Commission did not adopt that point of view, considering that objections, even those with intermediate effect, are not reservations and have the main purpose of countering a reservation, and that the "proximity" to the reservation of the provisions excluded by the objection[1958] suffices to avert any risk of lack of conformity with *jus cogens*.

(15) Consequently, the Commission deliberately rejected the idea of referring to the impermissibility of an objection owing to its being contrary to a rule of *jus cogens*: it considers that, in reality, such a hypothesis could not arise.

[1954] United Kingdom, objection of 5 June 1987 in respect of a Soviet reservation to article 66 of the Vienna Convention; see footnote 1937 above.

[1955] See article 20, paragraphs 4 (b), and article 21, paragraph 3, of the Vienna Conventions.

[1956] D. Müller, "Commentaire de l'article 21 (1969)", footnote 49 above, pp. 927–928, para. 70; 1969 Vienna Convention Article 21, footnote 49 above, vol. I, p. 561, para. 57.

[1957] The text of which is incorporated in guideline 3.1 of the Guide to Practice.

[1958] See subparagraph (1) of guideline 3.4.2.

(16) It is quite clear that if the effect of an objection is to modify the bilateral treaty relations between its author and the author of the reservation in a manner that proves to be contrary to a peremptory norm of international law (*jus cogens*), this result would be unacceptable. Such an eventuality would, however, seem to be impossible: an objection purports only to, and can only, exclude the application of one or more treaty provisions. Such an exclusion cannot "produce" a rule that is incompatible with a *jus cogens* norm. The effect is simply "deregulatory", thus leading to the application of customary law. Ultimately, therefore, the rules applicable as between the author of the reservation and the author of the objection are never different from those that pre-dated the treaty and, unless application of the treaty as a whole is excluded, from treaty-based provisions not affected by the reservation. It is impossible under these circumstances to imagine an "objection" that could violate a peremptory norm.

(17) Furthermore, when the definition of "objection" was adopted, the Commission refused to take a position on the question of the permissibility of objections that purport to produce a "super-maximum" effect.[1959] These are objections in which the authors deem not only that the reservation is not valid but also that, as a result, the treaty as a whole applies *ipso facto* in the relations between the two States. The permissibility of objections with super-maximum effect has frequently been questioned,[1960] primarily because "the effect of such a statement is not to bar the application of the treaty as a whole or of the provisions to which the reservation refers in the relations between the two Parties but to render the reservation null and void without the consent of its author. This greatly exceeds the consequences of the objections to reservations provided for in article 21, paragraph 3, and article 20, paragraph 4 (b), of the Vienna Conventions. Whereas 'unlike reservations, objections express the attitude of a State, not in relation to a rule of law, but in relation to the position adopted by another State', in this case it is the rule itself advocated by the reserving State which is challenged, and this is contrary to the very essence of an objection".[1961]

(18) It is not, however, the permissibility of the objection as such that is called into question; the issue raised by this practice is whether the objection is capable of producing the effect intended by its author;[1962] this is far from certain and depends, among other things, on the permissibility of the reservation itself.[1963] A State (or an international organization) may well make an objection and wish to give it super-maximum effect, but this does not mean that the objection is capable of producing such an effect, which is not envisaged by the Vienna regime. However, as the Commission acknowledges in its commentary on guideline 2.6.1, where the definition of the term "objection" unquestionably includes objections with super-maximum effect:

> "[T]he Commission has endeavoured to take a completely neutral position with regard to the validity of the effects [and not of the objection] that the author of the objection intends its objection to produce. This is a matter to be taken up in the consideration of the effects of objections."[1964]

[1959] See paragraphs (24) and (25) of the commentary to guideline 2.6.1 (Definition of objections to reservations).

[1960] See the eighth report on reservations to treaties (A/CN.4/535/Add.1), paras. 97 and 98 and footnote 154. See also the commentary to guideline 2.6.1, in particular paragraphs (24) and (25).

[1961] Eighth report on reservations to treaties (A/CN.4/535/Add.1), para. 97.

[1962] *Ibid.*, para. 95, and paragraphs (24) and (25) of the commentary to guideline 2.6.1.

[1963] See guidelines 4.3.4 and 4.5.3.

[1964] Paragraph (25) of the commentary to guideline 2.6.1 (Definition of objections to reservations).

(19) Furthermore, it should be stressed once again that an objection may not validly be formulated if its author has previously accepted the reservation in question. While this condition could be understood as a condition of permissibility of an objection, it may also be viewed as a question of form or of formulation. Thus, guideline 2.8.13 (Final nature of acceptance of a reservation) states that "acceptance of a reservation cannot be withdrawn or amended". There seems to be no need to revisit the issue in the present guideline.

3.5 Permissibility of an interpretative declaration

A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is prohibited by the treaty.

Commentary

(1) The Vienna Conventions contain no rule on interpretative declarations as such, or, of course, on the conditions for the permissibility of such unilateral declarations. In that regard, and in many others as well, they differ from reservations and cannot simply be equated with them. Guideline 3.5 and those that follow are intended to fill that gap in respect of the permissibility of these instruments – it being understood in this connection that "simple" interpretative declarations (guideline 3.5) must be distinguished from conditional interpretative declarations, which in this respect follow the legal regime of reservations.[1965]

(2) The definition of interpretative declarations provided in guideline 1.2 (Definition of interpretative declarations) is limited to identifying the practice in positive terms:

> "Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.

(3) However, this definition, as noted in the commentary, "in no way prejudges the validity or the effect of such declarations and (...) the same precautions taken with respect to reservations must be applied to interpretative declarations: the proposed definition is without prejudice to the permissibility and the effects of such declarations from the standpoint of the rules applicable to them".[1966]

(4) There is, however, still some question as to whether an interpretative declaration can be permissible, a question that is clearly different from that of whether a unilateral statement constitutes an interpretative declaration or a reservation. Indeed, it is one thing to determine whether a unilateral statement "purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions" — which corresponds to the definition of interpretative declaration — and another to determine whether the interpretation thus proposed is valid, or, in other words, whether the meaning or scope attributed by the declarant to a treaty or to certain of its provisions is valid.

(5) The issue of the permissibility of interpretative declarations can, of course, be addressed in the treaty itself;[1967] although quite uncommon in practice, this is still a possibility. Thus, a treaty's prohibition of any interpretative declaration would render

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[1965] For the definition of conditional interpretative declarations, see guideline 1.4, which states that "[c]onditional interpretative declarations are subject to the rules applicable to reservations".

[1966] Paragraph (33) of the commentary to guideline 1.2.

[1967] M. Heymann, footnote 147 above, p. 114.

impermissible any declaration that purported to "specify or clarify the meaning or scope" of the treaty or certain of its provisions. Article XV.3 of the 2001 Canada-Costa Rica Free Trade Agreement[1968] is an example of such a provision. Other examples exist outside the realm of bilateral treaties.[1969]

(6) It is also conceivable that a treaty might merely prohibit the formulation of certain interpretative declarations to certain of its provisions. To the Special Rapporteur's knowledge, no multilateral treaty contains such a prohibition in this form. But treaty practice includes more general prohibitions which, without expressly prohibiting a particular declaration, limit the parties' capacity to interpret the treaty in one way or another. It follows that if the treaty is not to be interpreted in a certain manner, interpretative declarations proposing the prohibited interpretation are impermissible. The European Charter for Regional or Minority Languages of 5 November 1992 includes examples of such prohibition clauses; article 4, paragraph 4, states:

> "Nothing in this Charter shall be construed as limiting or derogating from any of the rights guaranteed by the European Convention on Human Rights."

And article 5 states:

> "Nothing in this Charter *may be interpreted as* implying any right to engage in any activity or perform any action in contravention of the purposes of the Charter of the United Nations or other obligations under international law, including the principle of the sovereignty and territorial integrity of States."

(7) Similarly, articles 21 and 22 of the Framework Convention for the Protection of National Minorities of 1 February 1995 also limit the potential to interpret the Convention:

> "Article 21
>
> "Nothing in the present framework Convention *shall be interpreted as* implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States.
>
> "Article 22
>
> "Nothing in the present framework Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a Party."

(8) These examples show that the prohibition against interpretative declarations in guideline 3.5 may be express as well as implicit.

[1968] Article XV.3 – Reservations: "This Agreement shall not be subject to unilateral reservations or unilateral interpretative declarations" (available from http://www.sice.oas.org/Trade/cancr/English/text3_e.asp).

[1969] See the FTAA website, http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp; the square brackets are original to the text. The third draft agreement for the Free Trade Area of the Americas (FTAA) of November 2003, though still in the drafting stage, stated in Chapter XXIV, draft article 4:

> "This Agreement shall not be subject to reservations [or unilateral interpretative declarations] at the moment of its ratification."

(9) This is why the Commission did not consider it necessary to provide in guideline 3.5 for a situation where an interpretative declaration was incompatible with the object and purpose of the treaty: that would be possible only if the declaration was considered a reservation, since by definition such declarations do not purport to modify the legal effects of a treaty, but only to specify or clarify them.[1970] This situation is covered in guideline 3.5.1.

(10) Similarly, but for different reasons, the Commission declined to consider that an objectively wrong interpretation — for example, one contrary to the interpretation given by an international court adjudicating the matter — should be declared impermissible.

(11) It goes without saying that an interpretation may be held to be with or without merit although, in absolute terms, it is impossible to determine whether the author is right or wrong until a competent body rules on the interpretation of the treaty. Interpretation remains an eminently subjective process and it is rare that a legal provision, or a treaty as a whole, can be interpreted in only one way. "The interpretation of documents is to some extent an art, not an exact science."[1971]

(12) As Kelsen has noted:

> "If 'interpretation' is understood as cognitive ascertainment of the meaning of the object that is to be interpreted, then the result of a legal interpretation can only be the ascertainment of the frame which the law that is to be interpreted represents, and thereby the cognition of several possibilities within the frame. The interpretation of a statute, therefore, need not necessarily lead to a single decision as the only correct one, but possibly to several, which are all of equal value ..."[1972]

As has also been pointed out:

> "*Le processus interprétatif [en droit international n']est en effet qu'exceptionnellement centralisé, soit par un organe juridictionnel, soit de toute autre manière. La compétence d'interprétation appartient à l'ensemble des sujets, et, individuellement, à chacun d'eux. L'éclatement des modes d'interprétation qui en résulte n'est qu'imparfaitement compensé par leur hiérarchie. Les interprétations unilatérales sont en principe d'égale valeur, et les modes concertés sont facultatifs et par là même aléatoires. Il ne faut cependant pas surestimer les difficultés pratiques. Il ne s'agit pas tant d'une imperfection essentielle du droit international que d'une composante de sa nature, qui l'oriente tout entier vers une négociation permanente que les règles en vigueur permettent de rationaliser et de canaliser.*" [The process of interpretation [in international law] is, in fact, only occasionally centralized, either through a judicial body or in some other way. Competence to interpret lies with all subjects and, individually, with each one of them. The resulting proliferation of forms of interpretation is only partially compensated for by their hierarchy. Unilateral interpretations are, in principle, of equal value, and the agreed forms are optional and

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[1970] See paragraph (16) of the commentary to guideline 1.2. See also the famous dictum of the International Court of Justice in its advisory opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 18 July 1950, *I.C.J. Reports 1950*, p. 229; see also *Rights of Nationals of the United States of America in Morocco (France v. the United States of America)*, Judgment of 27 August 1952, *I.C.J. Reports 1952*, p. 196.

[1971] See the Commission's draft articles on the law of treaties, paragraph (4) of the commentary to draft articles 27 and 28, in the report of the International Law Commission on the work of its eighteenth session (A/6309/Rev.1), *Yearbook ... 1966*, vol. II, p. 218. See also A. Aust, footnote 155, p. 230.

[1972] Hans Kelsen, *Pure Theory of Law*, tr. Max Knight (Berkeley and Los Angeles: University of California Press, 1967), p. 351.

consequently unpredictable. However, the practical difficulties must not be overestimated. It is not so much a question of an essential flaw in international law as an aspect of its nature, which guides it in its entirety towards an ongoing negotiation that can be rationalized and channelled using the rules currently in force].[1973]

(13) Thus, "*[e]n vertu de sa souveraineté, chaque État a le droit d'indiquer le sens qu'il donne aux traités auxquels il est partie, en ce qui le concerne*" [on the basis of its sovereignty, every State has the right to indicate its own understanding of the treaties to which it is party].[1974] If States have the right to interpret treaties unilaterally, they must also have the right to let their point of view be known as regards the interpretation of a treaty or of certain of its provisions.

(14) International law does not, however, provide any criterion allowing for a definitive determination of whether a given interpretation has merit. There are, of course, methods of interpretation (see, to begin with, articles 31 to 33 of the Vienna Conventions), but they are only guidelines as to the ways of finding the "right" interpretation; they do not offer a final "objective" (or "mathematical") test of whether the interpretation has merit. Thus, article 31, paragraph 1, of the Vienna Conventions specifies that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*". This clarification in no way constitutes a criterion for assessing the correctness, and still less a condition of the permissibility, of the interpretations given to the treaty, but a means of deriving one interpretation. That is all.

(15) International law in general and treaty law in particular do not impose conditions for the permissibility of interpretation in general and of interpretative declarations in particular. It has only the notion of the opposability of an interpretation or an interpretative declaration, and that comes into play in the context of determining the effects of an interpretative declaration.[1975] In the absence of any condition of permissibility, "*[e]infache Interpretationserklärungen sind damit grundsätzlich zulässig*" ["simple interpretative declarations are therefore, in principle, admissible"],[1976] although this does not mean that it is appropriate to speak of permissibility or non-permissibility unless the treaty itself sets the criterion.[1977]

(16) In addition, it seemed to the Commission that in the course of assessing the permissibility of interpretative declarations, one must not slip into the domain of responsibility – which, for reservations, is excluded by guideline 3.3.2. This would be the case for interpretative declarations if one were to consider that a "wrong" interpretation constituted an internationally wrongful act that "violated" articles 31 and 32 of the Vienna Convention.

3.5.1 Permissibility of an interpretative declaration which is in fact a reservation

If a unilateral statement which appears to be an interpretative declaration is in fact a reservation, its permissibility must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.5.7.

[1973] Jean Combacau and Serge Sur, *Droit international public*, 8th ed. (Paris, Montchrestien, 2008), p. 171.

[1974] P. Daillier, M. Forteau and A. Pellet, footnote 254 above, p. 277, para. 164. See also Ch. Rousseau, footnote 351 above, p. 250.

[1975] See guidelines 4.7.1 to 4.7.3.

[1976] M. Heymann, footnote 147 above, p. 113.

[1977] See paragraphs (5) and (8) above.

Commentary

(1) Section 1.3 of the Guide to Practice envisages a situation in which an interpretative declaration purports, in fact, to exclude or to modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.[1978] In such a situation, it is not an interpretative declaration but a reservation, which should be treated as such and must therefore meet the conditions for the permissibility and formal validity of reservations.

(2) The Court of Arbitration that settled the dispute between France and the United Kingdom concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic* confirmed this approach. In that case, the United Kingdom maintained that France's third reservation to article 6 of the Geneva Convention on the Continental Shelf was merely an interpretative declaration and hence opposed that interpretation on the grounds that it could not be invoked against the United Kingdom. The Court rejected this line argument and considered that France's declaration was not simply an interpretation; it had the effect of modifying the scope of application of article 6 and was therefore a reservation, as France had maintained:

> "This condition, according to its terms, appears to go beyond mere interpretation; for it makes the application of that régime dependent on acceptance by the other State of the French Republic's designation of the named areas as involving 'special circumstances' regardless of the validity or otherwise of that designation under Article 6. Article 2 (1) (d) of the Vienna Convention on the Law of Treaties, which both Parties accept as correctly defining a 'reservation', provides that it means 'a unilateral statement, however phrased or named, made by a State … whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in its application to that State'. This definition does not limit reservations to statements purporting to exclude or modify the actual terms of the treaty; it also covers statements purporting to exclude or modify the *legal effect* of certain provisions in their application to the reserving State. This is precisely what appears to the Court to be the purport of the French third reservation and it, accordingly, concludes that this 'reservation' is to be considered a 'reservation' rather than an 'interpretative declaration'".[1979]

(3) While States often maintain or imply that an interpretation proposed by another State is incompatible with the object and purpose of the treaty concerned,[1980] an interpretative declaration, by definition, cannot be contrary to the treaty or to its object and purpose. If it is otherwise, the statement is, in fact, a reservation, as noted in many States' reactions to "interpretative declarations".[1981] Spain's reaction to the "declaration" formulated by Pakistan

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[1978] Guideline 1.3.3 (Formulation of a unilateral statement when a reservation is prohibited). It goes without saying that it is not enough for another State or another international organization to "recharacterize" an interpretative declaration as a reservation for the nature of the declaration in question to be modified (see guideline 2.9.3 (Recharacterization of an interpretative declaration) and commentary, in particular paragraphs (3) to (6)).

[1979] Arbitral award of 30 June 1977, *U.N.R.I.A.A.*, vol. XVIII, p. 40, para. 55 (emphasis in the original).

[1980] See, for example, Germany's reactions to Poland's interpretative declaration to the European Convention on Extradition of 13 December 1957 (European Treaty Series No. 24 (http://conventions.coe.int)) and to India's declaration interpreting article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (*Multilateral Treaties …*, chap. IV.3 and 4).

[1981] In addition to the aforementioned example of Spain's reservation, see Austria's objection to the "interpretative declaration" formulated by Pakistan in respect of the International Convention in signing the 1966 International Covenant on Economic, Social and Cultural Rights also demonstrates the different stages of thought in cases where the proposed "interpretation" is really a modification of the treaty that is contrary to its object and purpose. The "declaration" must first be characterized; only then will it be possible to apply to it the conditions of permissibility (of reservations):

> "The Government of the Kingdom of Spain has examined the Declaration made by the Government of the Islamic Republic of Pakistan on 3 November 2004 on signature of the International Covenant on Economic, Social and Cultural Rights, of 16 December 1966.
>
> "The Government of the Kingdom of Spain points out that regardless of what it may be called, a unilateral declaration made by a State for the purpose of excluding or changing the legal effects of certain provisions of a treaty as it applies to that State constitutes a reservation.
>
> "The Government of the Kingdom of Spain considers that the Declaration made by the Government of the Islamic Republic of Pakistan, which seeks to subject the application of the provisions of the Covenant to the provisions of the constitution of the Islamic Republic of Pakistan is a reservation which seeks to limit the legal effects of the Covenant as it applies to the Islamic Republic of Pakistan. A reservation that includes a general reference to national law without specifying its contents does not make it possible to determine clearly the extent to which the Islamic Republic of Pakistan has accepted the obligations of the Covenant and, consequently, creates doubts as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Covenant.
>
> "The Government of the Kingdom of Spain considers that the Declaration made by the Government of the Islamic Republic of Pakistan to the effect that it subjects its obligations under the International Covenant on Economic, Social and Cultural Rights to the provisions of its constitution is a reservation and that that reservation is incompatible with the object and purpose of the Covenant.
>
> "According to customary international law, as codified in the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a treaty are not permissible.
>
> "Consequently, the Government of the Kingdom of Spain objects to the reservation made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights. This objection shall not preclude the entry into force of the Covenant between the Kingdom of Spain and the Islamic Republic of Pakistan."[1982]

(4) Therefore, the issue is not the "permissibility" of interpretative declarations. Such unilateral statements are, in reality, reservations and accordingly must be treated as such,

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for the Suppression of Terrorist Bombings of 1997 and the comparable reactions of Australia, Canada, Denmark, Finland, France, Germany, India, Israel, Italy, Japan, the Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom and the United States of America (*Multilateral Treaties* ..., chap. XVIII.9). See also the reactions of Germany and the Netherlands to Malaysia's unilateral statement (*ibid.*) and the reactions of Finland, Germany, the Netherlands and Sweden to the "interpretative declaration" formulated by Uruguay in respect of the Statute of the International Criminal Court (*ibid.*, chap. XVIII.10). For other examples of recharacterization, see the commentary to guideline 1.2, footnote 149.

[1982] *Multilateral Treaties* ..., chap. IV.3.

including with respect to their permissibility and formal validity. The European Court of Human Rights followed that reasoning in its judgment in the case of *Belilos v. Switzerland*. Having recharacterized Switzerland's declaration as a reservation, it applied the conditions for the permissibility *of reservations* to the European Convention on Human Rights:

> "In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content. In the present case, it appears that Switzerland meant to remove certain categories of proceedings from the ambit of article 6 § 1 (art. 6-1) and to secure itself against an interpretation of that article (art. 6-1) which it considered to be too broad. However, the Court must see to it that the obligations arising under the Convention are not subject to restrictions which would not satisfy the requirements of article 64 (art. 64) as regards reservations. Accordingly, it will examine the validity of the interpretative declaration in question, as in the case of a reservation, in the context of this provision."[1983]

3.6 Permissibility of reactions to interpretative declarations

An approval of, opposition to, or recharacterization of, an interpretative declaration shall not be subject to any conditions for permissibility.

Commentary

(1) The question of the permissibility of reactions to interpretative declarations — approval, opposition or recharacterization[1984] — must be considered in light of the study of the permissibility of interpretative declarations themselves. Since any State, on the basis of its sovereign right to interpret the treaties to which it is a party, has the right to make interpretative declarations, there seems little doubt that the other contracting States or contracting organizations also have the right to react to these interpretative declarations and that, where appropriate, these reactions are subject to the same conditions for permissibility as those for the declaration to which they are a reaction.

(2) As a general rule, like interpretative declarations themselves, the approval or opposition they arouse may prove to be correct or erroneous, but that does not imply that they are permissible or impermissible.

(3) The question of the permissibility of recharacterizations of interpretative declarations should be approached slightly differently. In a recharacterization, the author does not call into question[1985] the content of the initial declaration, but rather its legal nature and the regime applicable to it.[1986]

[1983] Judgement, 29 April 1988, *Series A*, vol. 132, para. 49, p. 18.

[1984] See guidelines 2.9.1 to 2.9.3.

[1985] It may *simultaneously* call into question and object to the content of the recharacterized declaration by making an objection to it; in such cases, however, the recharacterization and the objection remain conceptually different from one another. In practice, States almost always combine the recharacterization with an objection to the reservation. It should be borne in mind, however, that recharacterizing an interpretative declaration as a reservation is one thing and objecting to the reservation thus "recharacterized" is another. Nonetheless, it should be noted that even in the case of a reservation that is "disguised" (as an interpretative declaration) — which, from a legal standpoint, has always been a reservation — the rules of procedure and formulation as set out in the present Guide to Practice remain fully applicable. This clearly means that a State wishing to formulate a recharacterization and an objection must abide by the procedural rules and time periods applicable to objections. This is why it is specified, in the

(4) The characterization of a reservation or interpretative declaration must be determined objectively, taking into account the criteria that the Commission set forth in guidelines 1.3 and 1.3.1 to 1.3.3. Guideline 1.3 states:

> "The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce."

(5) This "objective" test takes into account only the declaration's potential effects on the treaty *as intended by its author*. In other words:

> "only an analysis of the potential — and objective — effects of the statement can determine the purpose sought. In determining the legal nature of a statement formulated in connection with a treaty, the decisive criterion lies in the effective result that implementing the statement has (or would have). If it results (or would result) in modifying or excluding the legal effect of the treaty or certain of its provisions, it is a reservation 'however phrased or named'; if the statement simply clarifies the meaning or scope that its author attributes to the treaty or certain of its provisions, it is an interpretative declaration".[1987]

(6) Without prejudging the effects of such unilateral statements,[1988] it is clear that they are an important factor in determining the legal nature of the initially formulated act: in order to determine whether the act constitutes an interpretative declaration or reservations, these statements must be taken into account as expressing the position of parties to a treaty as to the nature of the "interpretative declaration" or "reservation", with all the consequences that this entails. Nevertheless, the author of a recharacterization is simply expressing its opinion on the matter. That opinion may prove to be justified or unjustified when the test of guideline 1.3 is applied, but that in no way implies that the recharacterization is permissible or impermissible; they are two different questions.

(7) Recharacterizations, whether justified or unjustified, are not subject to criteria of permissibility. Abundant State practice[1989] shows that contracting States or contracting organizations consider themselves entitled to make such declarations, often in order to ensure the integrity of the treaty or to ensure respect for treaty-based prohibitions of reservations.[1990]

4. Legal effects of reservations and interpretative declarations

Commentary

(1) Part 4 of the Guide to Practice covers the effects of reservations, acceptances and objections and, in addition, the effects of interpretative declarations and reactions to them (approval, opposition, recharacterization or silence). Part 4 follows the logic of the Guide to Practice, in which an attempt is made to present, as systematically as possible, all the legal

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second paragraph of guideline 2.9.3, that that State should accordingly treat the recharacterized declaration as a reservation.

[1986] See paragraph (5) of the commentary to guideline 2.9.3.

[1987] See paragraph (3) of the commentary to guideline 1.3.1 (Method of determining the distinction between reservations and interpretative declarations).

[1988] See guidelines 4.7.1 to 4.7.3 and commentaries.

[1989] See in particular paragraph (4) of the commentary to guideline 2.9.3.

[1990] For a particularly telling example, see the reactions of several States to the Philippines' "interpretative declaration" to the United Nations Convention on the Law of the Sea of 1982 (*Multilateral Treaties* ..., chap. XXI.6).

issues concerning reservations and related unilateral declarations, as well as interpretative declarations: after defining the concepts (in Part 1 of the Guide) and establishing the rules for assessing the formal validity (Part 2 of the Guide) and permissibility (Part 3 of the Guide) of these various declarations, Part 4 is concerned with determining the legal effects they produce.[1991]

(2) First of all, it is worth recalling a point that is crucial to understanding the legal effects of a reservation or interpretative declaration. Both of these instruments are defined in relation to the legal effects that their authors intend them to have on the treaty. Accordingly, guideline 1.1 (Definition of reservations) provides as follows:

> "Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, *whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty* in their application to that State or to that international organization.
>
> Paragraph 1 is to be interpreted as including reservations *which purport to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects* in their application to the State or to the international organization which formulates the reservation."[1992]

(3) In the same spirit, guideline 1.2 (Definition of interpretative declarations) states that:

> "Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby *that State or that organization purports to specify or clarify the meaning or scope attributed ... to a treaty or to certain of its provisions*.[1993]

(4) Although the potential legal effects of a reservation or interpretative declaration are thus a "substantive element"[1994] of its definition,[1995] this does not at all mean that a reservation or interpretative declaration actually produces those effects. Part 4 of the Guide is not intended to determine the effects that the author of a reservation or the author of an interpretative declaration intended it to have – that issue was dealt with in Part 1 on the definition and identification of reservations and interpretative declarations. Instead, Part 4 deals with determining the legal effects that reservations and interpretative declarations actually produce, possibly in relation to reactions from other contracting States or contracting organizations. The purported effects and the actual effects are not necessarily identical and depend, on the one hand, on the formal validity and permissibility of the reservations and interpretative declarations and, on the other hand, on the reactions of other interested States or international organizations.

[1991] The final part of the Guide to Practice, Part 5, addresses reservations (and, to a lesser degree, interpretative declarations) in cases of succession of States.

[1992] Emphasis added.

[1993] Emphasis added.

[1994] *Yearbook ... 1998*, vol. II (Part Two) p. 94, para. 500. It is generally recognized that the function of reservations is to purport to produce legal effects. Horn maintains that the fact that reservations purport to produce certain specific legal effects is the main criterion of this type of unilateral act (see F. Horn, footnote 25 above). See also the statements of Mr. Ruda and Mr. Rosenne, who emphasized the close link between the definition of the reservation and the legal effects that it may produce (*Yearbook ... 1965*, vol. I, 799th meeting, 19 June 1965, p. 167, para. 46, and 800th meeting, 11 June 1965, p. 171, para. 8).

[1995] For a definition of reservations in general, see guideline 1.1 and commentary thereto.

(5) Despite the relevant provisions of the Vienna Conventions, the effects of a reservation or of an acceptance of or objection to a reservation remain one of the most controversial issues of treaty law. Article 21 of the two Conventions refers exclusively to the "legal effects of reservations and of objections to reservations". The drafting of this provision was relatively straightforward compared to that of the other provisions on reservations. Neither the International Law Commission nor the United Nations Conference on the Law of Treaties held at Vienna in 1968 and 1969 seems to have had any particular difficulty in formulating the rules presented in the first two paragraphs of article 21 concerning the effects of reservations (while paragraph 3 deals with the effects of objections).

(6) The Commission's first Special Rapporteur on the law of treaties, Brierly, had already suggested in his draft article 10, paragraph 1, that a reservation should be considered as:

> "limiting or varying the effect of [a] treaty in so far as concerns the relation of [the] State or organization [author of the reservation] with one or more of the existing or future parties to the treaty".[1996]

(7) Fitzmaurice made the first proposal for a separate provision on the legal effects of a reservation, which largely prefigured the first two paragraphs of the current article 21.[1997] It is interesting that these draft provisions seemed to state the obvious to the Special Rapporteur: he did not make any comment on the draft and noted only that "it is considered useful to state these consequences, but they require no explanation".[1998]

(8) At the outset, Waldock suggested a provision on the effects of a reservation deemed "admissible",[1999] and from that time on his proposal underwent only minor drafting changes.[2000] Neither Waldock[2001] nor the Commission considered it necessary to comment at length on that rule, the Commission merely stating that:

> "These rules, which appear not to be questioned, follow directly from the consensual basis of the relations between parties to a treaty."[2002]

(9) Nor did the issue give rise to observations or criticisms from States between the two readings by the Commission or at the Vienna Conference.

(10) The drafting of the current article 21, paragraph 3, posed greater difficulties. This provision, logically absent from Waldock's first proposals (which precluded any treaty

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[1996] [First] report on the law of treaties, A/CN.4/23, *Yearbook … 1950*, vol. II, p. 238.

[1997] See his [first] report on the law of treaties, A/CN.4/101, *Yearbook … 1956*, vol. II, pp. 115–116.

[1998] *Ibid.*, p. 127, para. 101.

[1999] This is the term that was used in draft article 18, paragraph 5, as presented in Waldock's first report (A/CN.4/144), *Yearbook … 1962*, vol. II, p. 61.

[2000] The text proposed by Waldock for article 18, paragraph 5, became article 18 *ter*, devoted entirely to the legal effect of reservations, with a few editorial changes from the Drafting Committee (see *Yearbook … 1962*, vol. I, 664th meeting, 19 June 1962, p. 234, para. 63). Subsequently, the Drafting Committee made other changes to the draft (*ibid.*, 667th meeting, 25 June 1962, p. 253, para. 71). It ultimately became article 21, as adopted by the Commission on first reading in 1962 (*ibid.*, vol. II, p. 181). The text underwent changes made necessary by the rephrasing of other provisions on reservations. The changes were purely editorial, except for the change to subparagraph 1 (b) (on this point, see paragraph (34) of the commentary to guideline 4.2.4).

[2001] See his [first] report on the law of treaties, A/CN.4/144, *Yearbook … 1962*, vol. II, p. 68, para. 21.

[2002] See the Commission's commentary in 1962 (*Yearbook … 1962*, vol. II, p. 181 (commentary to article 21)) and the commentary to draft article 19 adopted on second reading in 1965 (*Yearbook … 1966*, vol. II, p. 209, para. 1).

relations between a reserving State and an objecting State)[2003] had to be included in the article on the effects of reservations and objections when the Commission accepted that a State objecting to a reservation could nevertheless establish treaty relations with the author of the reservation.[2004] A proposal by the United States of America to that effect convinced Waldock of the logical need for such a provision,[2005] but its drafting by the Commission was nevertheless time-consuming.[2006] The Conference made only a relatively minor change in order to harmonize paragraph 3 with the reversal of the presumption of article 20, paragraph 4 (b).[2007]

(11) The resumed consideration of article 21 during the drafting of the 1986 Vienna Convention did not pose any significant difficulties. During the very brief discussion of draft article 21, two members of the Commission emphasized that the provision in question "followed logically" from draft articles 19 and 20.[2008] Even more clearly, Mr. Calle y Calle stated that:

> "if reservations were admitted, their legal effect was obviously to modify the relations between the reserving party and the party with regard to which the reservation was established".[2009]

(12) The Commission, and then several years later the Vienna Conference, adopted article 21 with only the drafting changes required by the broader scope of the 1986 Convention.

(13) One might think that the widespread acceptance of article 21 during the adoption of the draft articles on the law of treaties between States and international organizations or between

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[2003] Sir Humphrey Waldock, fourth report on the law of treaties, A/CN.4/177 and Add.1 and 2, *Yearbook ... 1965*, vol. II, p. 56, para. 3.

[2004] See D. Müller, Commentaire de l'article 21 (1969), footnote 49 above, p. 888, paragraphs 7 and 8; and 1969 Vienna Convention Article 21, footnote 49, pp. 540–541, paras. 7–8.

[2005] Fourth report on the law of treaties, A/CN.4/177 and Add.1, *Yearbook ... 1965*, vol. II, pp. 47 and 55. See also the comments of the Danish Government (*ibid.*, p. 46).

[2006] Although Sir Humphrey Waldock considered that the case of a reservation to which a simple objection had been made was "not altogether easy to express" (*Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, p. 270, para. 96), most of the members (see Mr. Ruda (*ibid.*, para. 13); Mr. Ago (*ibid.*, 814th meeting, 29 June 1965, p. 271, paras. 7 and 11); Mr. Tunkin (*ibid.*, para. 8); and Mr. Briggs (*ibid.*, p. 272, para. 14)) were convinced that it was necessary, and even "indispensable" (Mr. Ago, *ibid.*, p. 271, para. 7) to introduce a provision on that subject "in order to forestall ambiguous situations" (*ibid.*, p. 271, para. 7). However, members had different opinions as to the basis of the paragraph proposed by the United States and the Special Rapporteur: whereas Waldock's proposal emphasized the consensual basis of the treaty relationship established despite the objection, the paragraph proposed by the United States seemed to suggest that the intended effect originated only from the unilateral act of the objecting State, that is, from the objection, without the reserving State having a real choice. The two positions had their supporters within the Commission (see the positions of Mr. Yasseen (*ibid.*, 800th meeting, 11 June 1965, p. 171, para. 7 and pp. 172 and 173, paras. 21–23 and 26), Mr. Tunkin (*ibid.*, 800th meeting, 11 June 1965, p. 172, para. 18) and Mr. Pal (*ibid.*, para. 24) and those of Sir Humphrey Waldock (*ibid.*, p. 173, para. 31), Mr. Rosenne (*ibid.*, p. 172, para. 10) and Mr. Ruda (*ibid.*, p. 172, para. 13)). The text that the Commission finally adopted on a unanimous basis (*ibid.*, 816th meeting, 2 July 1965, p. 284), however, is very neutral and clearly shows that the issue was left open by the Commission (see also the Special Rapporteur's summing-up, *ibid.*, 800th meeting, 11 June 1965, p. 173, paragraph 31).

[2007] *Second Session, Summary records*, footnote 332 above, 33rd plenary meeting, 21 May 1969, p. 181.

[2008] See Mr. Tabibi, *Yearbook ... 1977*, vol. I, 1434th meeting, 6 June 1977, p. 98, para. 7; Mr. Dadzie, *ibid.*, p. 99, para. 18.

[2009] *Ibid.*, p. 98, para. 8.

international organizations showed that the provision was already accepted by that time as reflecting international custom on the subject. The arbitral award in the case concerning *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic* corroborates this analysis. The Court of Arbitration recognized that:

> "the law governing reservations to multilateral treaties was then undergoing an evolution which crystallized only in 1969 in Articles 19 to 23 of the Vienna Convention on the Law of Treaties".[2010]

(14) Nevertheless, the effects of a reservation and acceptance of it or objection to it are by no means fully addressed by article 21 of the 1969 and 1986 Vienna Conventions. The provision concerns only the effect of those instruments on the content of the treaty relationship between the reserving party and the other contracting States and contracting organizations.[2011] A separate issue, not that of the effect of the reservation itself, but that of the effects of acceptance or objection on the consent of the reserving party to be bound by the treaty, is governed not by article 21 of the two Vienna Conventions, but by article 20, entitled "Acceptance of and objection to reservations".

(15) This provision, which is the result of draft article 20 adopted by the Commission on first reading in 1962, entitled "The effects of reservations",[2012] was nevertheless incorporated in 1965 in the new draft article 19, entitled "Acceptance of and objection to reservations"[2013] (which later became article 20 of the 1969 Vienna Convention), after significant reworking

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[2010] *United Nations, Reports of International Arbitral Awards*, vol. XVIII, p. 32, para. 38.

[2011] See guideline 4.2.4 and commentary.

[2012] The draft article read as follows:

> "1. (a) A reservation expressly or impliedly permitted by the terms of the treaty does not require any further acceptance.
>
> (b) Where the treaty is silent in regard to the making of reservations, the provisions of paragraphs 2 to 4 below shall apply.
>
> 2. Except in cases falling under paragraphs 3 and 4 below and unless the treaty otherwise provides:
>
> (a) Acceptance of a reservation by any State to which it is open to become a party to the treaty constitutes the reserving State a party to the treaty in relation to such State, as soon as the treaty is in force;
>
> (b) An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.
>
> 3. Except in a case falling under paragraph 4 below, the effect of a reservation to a treaty which has been concluded between a small group of States shall be conditional upon its acceptance by all the States concerned unless:
>
> (a) The treaty otherwise provides; or
>
> (b) The States are members of an international organization which applies a different rule to treaties concluded under its auspices.
>
> 4. Where the treaty is the constituent instrument of an international organization and objection has been taken to a reservation, the effect of the reservation shall be determined by decision of the competent organ of the organization in question, unless the treaty otherwise provides."

[2013] *Yearbook ... 1965*, vol. II, p. 162.

out of concern for clarity and simplicity.[2014] In the context of that reworking, the Commission also decided to abandon the link between objections and the conditions for permissibility of a reservation, including its compatibility with the object and purpose of the treaty.

(16) At the Vienna Conference, the first paragraph of this provision underwent major changes,[2015] and paragraph 4 (b) was then altered by a Soviet amendment.[2016] The amendment was far-reaching, as it reversed the presumption of article 4 (b): any objection would in the future be considered a simple objection unless its author had clearly expressed an intention to the contrary. Furthermore, despite the inappropriate title of article 20, it is clear from the origin of this provision that it was intended to cover, *inter alia*, the effects of a reservation, of the acceptance thereof and of any objections to that reservation.

(17) Nevertheless, articles 20 and 21 of the Vienna Convention have some unclear elements and some gaps. In State practice, the case contemplated in article 21, paragraph 3, namely objections with minimum effect, is no longer viewed as "unusual",[2017] as the Commission had initially envisaged; on the contrary, owing to the presumption of article 20, paragraph 4 (b), it has become the most frequent type of objection.

(18) However, the practice of States is not limited to recourse to the effects set out in paragraph 3. They are increasingly trying to have their objections produce different effects. The absence of a firm position on the part of the Commission, which intentionally opted for a neutral solution that was acceptable to everyone, far from resolving the problem, created others that the Guide to Practice attempts to resolve.

(19) Nor do articles 20 and 21 answer the question of what effects are produced by a reservation that does not meet the conditions of permissibility set out in article 19 or of formal validity (contained in article 23 and elsewhere). In other words, neither article 20 nor article 21 set out the consequences of the invalidity of a reservation, at least not expressly. It is also of particular concern that the application of paragraph 3 on the combined effects of a reservation and an objection is not limited to cases of permissible reservations – that is, reservations established in accordance with article 19, unlike the case set out in paragraph 1. The very least that can be said is that "[a]rticle 21 is somewhat obscure".[2018]

(20) In these circumstances, the Commission considered it necessary to draw a distinction between the rules applying to the legal effects of a valid reservation,[2019] which are set out — at least partially — in the two Vienna Conventions, and those concerning the legal effects of an invalid reservation.[2020]

[2014] See Sir Humphrey Waldock, fourth report on the law of treaties (A/CN.4/177 and Add.1 and 2), *Yearbook ... 1965*, vol. II, p. 50, paras. 4 and 5.

[2015] See the amendments by Switzerland (A/CONF.39/C.1/L.97), France and Tunisia (A/CONF.39/C.1/L.113) and Thailand (A/CONF.39/C.1/L.150). These amendments were adopted by a large majority (*First Session, Summary records*, footnote 35 above, 25th meeting, 16 April 1968, p. 135, para. 30).

[2016] A/CONF.39/L.3, *Documents of the Conference*, footnote 54 above, pp. 265–266. This amendment was adopted by 49 votes to 21, with 30 abstentions (*Second Session*), footnote 332 above, 10th plenary meeting, 29 April 1969, p. 35, para. 79. See also D. Müller, "Article 20 (1969)", footnote 1087 above, pp. 806–807, para. 14; and 1969 Vienna Convention Article 20, footnote 1087 above, pp. 494–495, para. 14.

[2017] See Sir Humphrey Waldock, fourth report on the law of treaties, A/CN.4/177 and Add.1, *Yearbook ... 1965*, vol. II, p. 55.

[2018] G. Gaja, footnote 28 above, p. 330.

[2019] See sections 4.1 to 4.4 of the Guide to Practice.

[2020] See section 4.5.

(21) The silence of the Vienna Conventions on the matter of interpretative declarations[2021] extends, obviously, to the effects of such declarations, which are covered in section 4.7 of Part 4 of the Guide to Practice.

4.1 Establishment of a reservation with regard to another State or international organization

A reservation formulated by a State or an international organization is established with regard to a contracting State or a contracting organization if it is permissible and was formulated in accordance with the required form and procedures, and if that contracting State or contracting organization has accepted it.

Commentary

(1) The legal effects of a valid reservation depend to a large extent on the reactions that it has received. A valid and accepted reservation produces legal effects different from those of a valid reservation to which objections have been made. Article 21 of the Vienna Conventions establishes this distinction clearly. In its 1986 version, which is fuller in that it includes the effects of reservations and reactions of international organizations, it states:

> "1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
>
> (a) Modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
>
> (b) Modifies those provisions to the same extent for that other party in its relations with the reserving State or international organization.
>
> 2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.
>
> 3. When a State or an international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation."

(2) While paragraph 1 of this provision concerns the legal effects of an "established" reservation, a concept that should be clarified, paragraph 3 covers the legal effects of a reservation to which an objection has been made. A distinction should therefore be drawn between the case of a valid and accepted reservation — that is, an "established" reservation — and that of a valid reservation[2022] to which an objection has been made.

(3) While the Commission was aware that there might be some hesitation regarding that terminology, which was not defined in the Vienna Conventions and could give the impression of artificially creating a new category of reservations, it considered that that concept, found in

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[2021] See paragraph (1) of the commentary to guideline 1.2 (Definition of interpretative declarations).

[2022] It should be noted that paragraph 3 of article 21 does not refer to the validity of the reservation which has been the subject of an objection. It cannot therefore be excluded, *a priori*, that this provision also applies to an objection to an invalid reservation; on this point, see paragraphs (9) to (12) of the commentary to guideline 4.5.2.

article 21, paragraph 1, of the Vienna Conventions, while not creating a specific category of reservation, was of great significance for defining the effects of reservations. It would therefore be useful, at least, to endeavour to clarify the meaning of the term in the part of the Guide to Practice covering the effects of reservations.

(4) According to the *chapeau* of article 21, paragraph 1, only a reservation that has been established — in accordance with the provisions of articles 19, 20 and 23 — has the legal effects set out in subparagraphs (a) and (b) of that paragraph. As for the scope of application of article 21, paragraph 1, the Vienna Conventions merely make a rather awkward reference to provisions concerning the permissibility of a reservation (art. 19), consent to a reservation (art. 20) and the form of a reservation (art. 23), without explaining the relationship between those provisions in greater detail. It therefore seems appropriate to define what is meant by an "established" reservation within the meaning of article 21, paragraph 1, before considering the legal effects it produces.

(5) Under the terms of the *chapeau* of article 21 of the Vienna Conventions, a reservation is established "with regard to another party in accordance with articles 19, 20 and 23". The phrase, which at first appears clear and is often understood as referring to valid reservations accepted by a contracting State or contracting organization, contains many uncertainties and imprecisions, which are the result of a significant recasting undertaken by the Commission during the second reading of the draft articles on the law of treaties in 1965 and of the changes made to article 20, paragraph 4 (b), of the Convention during the Vienna Conference in 1969.

(6) First of all, the reference to article 23 as a whole poses a problem, since the provisions of article 23, paragraphs 3 and 4, have no effect on the establishment of a reservation. They concern only its withdrawal and the fact that, in certain cases, the formulation of an acceptance or an objection does not require confirmation.

(7) Secondly, it is difficult, if not impossible, to determine what connection might exist between the establishment of a reservation and the effect on the entry into force of the treaty of an objection provided for in article 20, paragraph 4 (b). The objection cannot be considered as consent to the reservation since it in fact aims to "preclude the reservation from having its intended effects or otherwise [oppose] the reservation".[2023] Accordingly, a reservation to which an objection has been made is obviously not established within the meaning of article 21, paragraph 1.

(8) Consultation of the *travaux préparatoires* provides an explanation for this "contradiction". In the draft articles adopted by the Commission, which contained in article 19 (later article 21) the same reference, the presumption of article 17 (future article 20, paragraph 4 (b)) established the principle that a treaty did not enter into force between a reserving State and a State which had made an objection. Since the treaty was not in force, there was no reason to determine the legal effects of the reservation on the content of treaty relations. Moreover, the comments of the Commission specified: "Paragraphs 1 and 2 of this article set out the rules concerning the legal effects of a reservation which has been established under the provisions of articles 16, 17 and 18, *assuming that the treaty is in force*."[2024] The "contradiction" was introduced only during the Conference as a result of the reversal of the presumption of article 20, paragraph 4 (b), following the adoption of the Soviet amendment.[2025] Because of that new presumption, a treaty does remain in force for the

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[2023] See guideline 2.6.1 (Definition of objections to reservations).

[2024] *Yearbook ... 1966*, vol. II, p. 209, para. (1) of the commentary to article 19 (emphasis added).

[2025] See paragraph (16) above of the introduction to Part 4 of the Guide to Practice and, in particular, footnote 2016 above.

reserving State even if a simple objection is formulated. However, this could not mean that the reservation is established under article 21.

(9) In his first report on the law of treaties, Waldock did take into account the requirement of consent to a reservation for it to be able to produce its effects. The draft article 18 that he proposed to devote to "Consent to reservations and its effects" specified that:

> "A reservation, since it purports to modify the terms of the treaty as adopted, shall only be effective against a State which has given, or is presumed to have given, its consent thereto in accordance with the provisions of the following paragraphs of this article."[2026]

(10) In its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice also highlighted this basic principle of the law of reservations, and of treaty law in general:

> "It is well established that in its treaty relations a State cannot be bound without its consent and that consequently no reservation can be effective against any State without its agreement thereto."[2027]

It is this idea to which paragraph 1 of article 21 of the Vienna Conventions refers, and this is the meaning that must be given to the reference to article 20.

(11) Consent to the reservation is therefore a *sine qua non* for the reservation to be considered established and to produce its effects. Yet contrary to what has been maintained by certain partisans of the "opposability" school,[2028] consent is not the only condition. The *chapeau* of article 21, paragraph 1, cumulatively refers to consent to the reservation (the reference to article 20), permissibility (art. 19) and formal validity (art. 23). Consent alone is thus not sufficient for the reservation to produce its "normal" effects. Moreover, the reservation must be permissible in the sense of article 19 and have been so formulated that it complies with the rules of procedure and form set forth in article 23. Only this combination can "establish" the reservation. That was the position taken by the Inter-American Court of Human Rights in its advisory opinion of 24 September 1982 concerning *The effect of reservations on the entry into force of the American Convention on Human Rights*, which concluded from its examination of the Vienna system (to which article 75 of the Pact of San José directly refers) that "States ratifying or adhering to the Convention may do so with any reservations *that are not incompatible with its object and purpose*";[2029] the Court also held

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[2026] *Yearbook ... 1962*, vol. II, p. 61.

[2027] *I.C.J. Reports 1951*, footnote 604 above, p. 17. See also D. Müller, Commentaire de l'article 20 (1969), footnote 1087 above, pp. 809–811, paras. 20–24; and 1969 Vienna Convention Article 20, footnote 1087 above, pp. 18–22, paras. 496–498.

[2028] In contrast to the "permissibility" school. On these two schools, see the general commentary to Part 3 of the Guide to Practice (Permissibility of reservations and interpretative declarations), paragraph (4). See also the first report on the law and practice relating to reservations to treaties, A/CN.4/470, *Yearbook ... 1995*, pp. 158–9; Jean Kyongun Koh, "Reservations to multilateral treaties: how international legal doctrine reflects world vision", *Harvard International Law Journal*, 1982, pp. 71–116; C. Redgwell, footnote XXX above, pp. 263–269; R. Riquelme Cortado, footnote XXX above, pp. 73–82; Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., footnote XXX above, (Manchester University Press, 1984), p. 81, footnote 78; and A. Pellet, "Article 19 (1969)", footnote 1454 above, pp. 696–699, paras. 111–118; A. Pellet, 1969 Vienna Convention Article 19, footnote 1454 above, pp. 425–426, paras. 49–53.

[2029] Inter-American Court of Human Rights, *The effect of reservations on the entry into force of the American Convention on Human Rights* (arts. 74 and 75), advisory opinion of 24 September 1982, Series A, No. 2, para. 26 – emphasis added. The Court, referring to the specific nature of that the Convention implied the acceptance of all the reservations that were not incompatible with its object and purpose.

(12) This necessary combination of validity and consent results also from the phrase in article 21, paragraph 1, which states that a reservation is established "with regard to another party". Logically, a reservation cannot be valid only with regard to another party. Either it is valid or it is not. This is a question that is not in principle subject to the will of the other contracting States or contracting organizations,[2030] subject to the remaining uncertainty as to the possibility that they might decide by common agreement to "permit" the reservation.[2031] On the other hand, a reservation that is valid is opposable only to the States or organizations that have, in one way or another, consented to it. It is a bilateral link which is created, following acceptance, between the author of the reservation and the contracting State or organization that has consented to it. The reservation is established only in regard to that party, and it is only in relations with that party that it produces its effects.

(13) As a consequence, it seems necessary to emphasize once again in the Guide to Practice that the establishment of a reservation results from the combination of its validity and of consent expressed by another contracting State or contracting international organization. However, the Commission did not consider it appropriate simply to reproduce the *chapeau* of article 21, paragraph 1, which explains the meaning of the term "established reservation" by referring to other provisions of the Vienna Conventions from which it derives. Guideline 4.1 in fact has the same meaning; however, instead of referring to other provisions, it sets out their content: "if it is permissible" corresponds to the reference to article 19;[2032] "[if it] was formulated in accordance with the required form and procedures" corresponds to the reference in article 21, paragraph 1, to article 23;[2033] and "if that contracting State or contracting organization has accepted it" corresponds to the reference to article 20.

(14) The formulation of guideline 4.1 differs from the *chapeau* of the first paragraph of article 21 of the Vienna Conventions in another regard: instead of referring to "another party",[2034] guideline 4.1 covers cases in which "a reservation ... is established with regard to *a contracting State or contracting organization*". The reason for this is that, while article 21 applies to the actual effects of a reservation and presupposes that the treaty to which the reservation applies has already entered into force, guideline 4.1 merely specifies the conditions under which the reservation will be legally *capable* of producing the effects intended by its author, if and when the treaty enters into force.

(15) Guideline 4.1 merely sets out the general rule and does not fully answer the question of whether a reservation is established. Article 20 of the Vienna Conventions, paragraph 4 of which specifies the implications, under general law, of consent to a reservation and hence

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the Convention, nevertheless held that reservations to the Convention "do not require acceptance by the States Parties ..." (*ibid.*, para. 37); however, as the Court subsequently noted, that assertion was valid solely in the context of entry into force of the Convention (para. 38 – on this point, see the commentary to guidelines 4.2.2 and 4.2.5 below).

[2030] See guideline 3.3.3.

[2031] See paragraphs (8) to (13) of the commentary to guideline 3.3.3.

[2032] See guideline 3.1 (Permissible reservations).

[2033] See guidelines 2.1.1 (Form of reservations), 2.1.5 (Communication of reservations) and 2.2.1 (Formal confirmation of reservations formulated when signing a treaty). Generally speaking, this reference to "required procedures" refers to the procedural requirements set out in the Vienna Conventions, the Guide to Practice and, in some cases, the treaty to which the reservation applies.

[2034] "A reservation established with regard *to another party* in accordance with articles 19, 20 and 23 ...".

constitutes the cornerstone of the flexible Vienna system,[2035] does in fact contain exceptions with regard to the expression of consent to the reservation by the other contracting States and contracting organizations. Moreover, paragraph 4 clearly specifies that it applies only in "cases not falling under the preceding paragraphs and unless the treaty otherwise provides". The establishment of the reservation, and particularly the requirement of consent, may thus be modified depending on the nature of the reservation or of the treaty, but also by any provision incorporated in the treaty to that effect. These specific cases in which the consent of the other contracting States and contracting organizations is no longer required, or must be expressed unanimously or collectively, are covered in guidelines 4.1.1, 4.1.2 and 4.1.3.

(16) The words "with regard to" a State or an international organization, which appear in both the body and title of guideline 4.1, aim to make it clear that this provision refers to the usual situation in which the establishment of the reservation produces only relative effects, between the author of a reservation and a State or international organization that has accepted the reservation, in contrast to the special situations in which acceptance by another contracting State or another contracting international organization is not required in order for the reservation to produce its effects (see guidelines 4.1.1 and 4.1.3) or in which unanimous acceptance of the reservation by all the contracting States and contracting organizations is required for that purpose (see guideline 4.1.2).

(17) Article 21, paragraph 2, of the Vienna Conventions does not, strictly speaking, concern the legal effects of a reservation, but rather deals with the absence of any legal effect of a reservation on the legal relations between contracting States and contracting organizations other than the author of the reservation, regardless of whether the reservation is established or valid. This matter is dealt with in section 4.6 of the Guide to Practice.

4.1.1 Establishment of a reservation expressly authorized by a treaty

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States and contracting organizations, unless the treaty so provides.

2. A reservation expressly authorized by a treaty is established with regard to the other contracting States and contracting organizations if it was formulated in accordance with the required form and procedures.

Commentary

(1) Guideline 4.1.1 presents the exception to the general rule concerning the establishment of reservations contained in article 20, paragraph 1, of the Vienna Conventions, while establishing a link to the term "established reservation". Since a reservation expressly authorized by the treaty is, by definition, permissible and accepted by the contracting States and contracting organizations, making it in a way that respects the rules applicable to the formulation and communication of reservations is all that is required to establish it. It thus becomes opposable to all the contracting States and contracting organizations.

(2) According to article 20, paragraph 1, of the Vienna Conventions, expressly authorized reservations do not require "subsequent" acceptance by the other contracting States and

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[2035] See *Yearbook ... 1966*, vol. II, p. 207, para. (21) of the commentary to article 17. See also D.W. Bowett, footnote 150 above, p. 84; D. Müller, *Commentaire de l'article 20 (1969)*, footnote 1087 above, p. 799, para. 1; D. Müller, 1969 Vienna Convention Article 20, footnote 1087 above, p. 490, para 1.

contracting organizations. However, paragraph 1 does not imply that the reservation is exempt from the requirement of the contracting States' and contracting organizations' assent; it simply expresses the idea that, since they have given their assent even before the formulation of the reservation, and have done so in the text of the treaty itself, any subsequent acceptance is superfluous. Moreover, the expression "unless the treaty so provides" which appears in the text of this provision[2036] clearly calls for such an interpretation. Only reservations that are actually covered by such prior agreement are exempt from the need for subsequent acceptance, and are thus, logically, established from the moment they are validly made.[2037]

(3) The draft articles adopted by the Commission on second reading in 1966 did not restrict the possibility of acceptance solely to reservations "expressly" authorized by the treaty, but also included reservations "impliedly" authorized, but the work of the Commission sheds no light on the meaning to be attributed to this concept.[2038] At the Vienna Conference, a number of delegations expressed doubts regarding the soundness of this solution[2039] and proposed amendments aimed at deleting the words "or impliedly",[2040] and the change was accepted.[2041] Waldock, Expert Consultant at the Conference, himself recognized that "the words 'or impliedly' in article 17, paragraph 1, seemed to have been mistakenly retained in the draft articles as a relic from earlier and more detailed drafts which dealt with implied prohibition and implied authorization of reservations".[2042] It is thus with good reason that reservations implicitly authorized by the treaty are not mentioned in article 20, paragraph 1.

(4) Had it been concluded, as was suggested,[2043] that where a treaty prohibits certain reservations or certain categories of reservations, it *ipso facto* authorizes all others, which would amount to a reversal of the presumption of article 19, subparagraph (b), this interpretation would clearly place article 20, paragraph 1, in direct contradiction to article 19. On such an assumption, the inclusion in the treaty of a clause prohibiting reservations to a specific provision would suffice to institute total freedom to make any reservation whatsoever other than those that were expressly prohibited; the criterion of the object and purpose of the treaty would then be deprived of any effect.[2044] The Commission has already ruled out this interpretation in guideline 3.1.3 (Permissibility of reservations not prohibited by the treaty),

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[2036] The words "unless the treaty so provides" were added by the Special Rapporteur, Sir Humphrey Waldock, in order to take account of "the possibility ... that a treaty may specifically authorize reservations but on condition of their acceptance by a specified number or fraction of the parties" (fourth report on the law of treaties, A/CN.4/177 and Add.1 and 2, *Yearbook ... 1965*, vol. II, p. 50). This wording was slightly modified by the Drafting Committee (*ibid.*, vol. I, 813th meeting, 29 June 1965, p. 265, para. 30). In 1966, the wording was once again slightly modified, but the summary records of the meetings shed no light on the reasons for this change.

[2037] "Made", not "formulated", because they produce their effects without any additional formality being required. See the commentary to guideline 3.1 (Permissible reservations), paragraph (6).

[2038] *Yearbook ... 1966*, vol. II, p. 202 and the commentary, which is quite brief and not particularly illuminating on this point, p. 207, para. (18).

[2039] See the statements by the representatives of India (*First Session, Summary records*, footnote 35 above, 24th meeting, p. 128, para. 30), the United States (*ibid.*, p. 130, para. 53) and Ethiopia (*ibid.*, 25th meeting, 16 April 1968, p. 134, para. 15).

[2040] See the amendments by France and Tunisia (A/CONF.39/C.1/L.113), Switzerland (A/CONF.39/C.1/L.97) and Thailand (A/CONF.39/C.1/L.150) (*Documents of the Conference*, footnote 54 and footnote 2015 above, p. 135).

[2041] The three amendments aimed at deleting "or impliedly" (see footnote 2040 above) were adopted by 55 votes to 18, with 12 abstentions (*First Session, Summary records*, footnote 35 above, 25th meeting, 16 April 1968, p. 135, para. 30).

[2042] *Ibid.*, 24th meeting, 16 April 1968, pp. 126 and 127, para. 14.

[2043] F. Horn, footnote 25 above, p. 132.

[2044] See in particular the criticisms by C. Tomuschat, footnote 1084 above, p. 475.

which makes it clear that reservations not prohibited by the treaty are not *ipso facto* permissible and hence can certainly not be regarded as established and accepted by the terms of the treaty itself.

(5) By the same token, and despite the lack of precision in the Vienna Conventions on this point, a general authorization of reservations in a treaty cannot constitute *a priori* acceptance of any and all reservations on the part of the contracting States and contracting organizations. To say that all the parties have the right to formulate reservations to the treaty cannot imply that that right is unlimited, still less that all reservations so formulated are, by virtue of the simple general clause included in the treaty, "established" within the meaning of the *chapeau* to article 21, paragraph 1. To accept an unlimited right to formulate reservations under such circumstances would render the Vienna regime utterly meaningless. Such general authorizations do no more than refer to the general regime, of which the Vienna Conventions constitute the expression, and which is based on the fundamental principle that the parties to a treaty have the right to formulate reservations.

(6) Nor is the notion of an expressly authorized reservation identical or equivalent[2045] to the concept of a specified reservation. This was very clearly established by the arbitral tribunal in the case concerning *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic* in relation to the interpretation of article 12 of the 1958 Geneva Convention on the Continental Shelf, paragraph 1 of which provides that:

> "At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to Articles 1 to 3 inclusive."

There can be no doubt that, pursuant to this provision, any State may make its consent to be bound by the Geneva Convention subject to the formulation of a reservation so "specified", that is to say any reservation relating to articles 4 to 15, in accordance with article 19 (b) of the Vienna Conventions. This "authorization" does not however imply that any reservation so formulated is necessarily permissible,[2046] nor, *a fortiori*, that the other parties have consented, under article 12, paragraph 1, to any and every reservation to articles 4 to 15. The Court of Arbitration considered that this provision:

> "cannot be read as committing States to accept in advance any and every reservation to articles other than Articles 1 to 3 ... Such an interpretation ... would amount almost to a license to contracting States to write their own treaty".[2047]

(7) State practice supports the solution adopted by the Court of Arbitration. The fact that 11 States objected to reservations made to the 1988 Geneva Convention,[2048] even though those reservations only concerned articles other than articles 1 to 3, the only ones mentioned

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[2045] P.-H. Imbert nevertheless maintains that specified reservations are included within the term "expressly authorized reservation". In support of this interpretation he suggests that article 20, paragraph 1, in no way limits the right of contracting States to object to an expressly authorized reservation, but expresses only the idea that the reserving State becomes a contracting party upon the deposit of its instrument of ratification or accession, (footnote 1019 above, pp. 52–57). He does not deny that this solution openly contradicts the provisions of article 20, but justifies his approach by referring to the work of the Vienna Conference. See also paragraph (11) of the commentary to guideline 3.1.2.

[2046] See on this question guideline 3.1.4 (Permissibility of specified reservations) and the commentary thereto.

[2047] Decision of 30 June 1977, *Reports of International Arbitral Awards*, vol. XVIII, p. 32, para. 39.

[2048] *Multilateral Treaties* ..., chap. XXI.4.

in article 12, paragraph 1, of the Convention, is further revealing as regards the interpretation to be followed.

(8) The term "reservations expressly authorized" by the treaty must be interpreted restrictively in order to meet the objective of article 20, paragraph 1. In the case between France and the United Kingdom concerning *Delimitation of the Continental Shelf*, the Court of Arbitration rightly considered that:

> "Only if the Article had authorized the making of specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance."[2049]

In order to determine which "expressly authorized" reservations do not require subsequent unilateral acceptance, it is thus appropriate to determine which reservations the parties have already consented to in the treaty. In this connection, it has been noted that "where the contents of authorized reservations are fixed beforehand, acceptance can reasonably be construed as having been given in advance, at the moment of consenting to the treaty".[2050]

(9) In line with that opinion, article 20, paragraph 1, covers two types of prior authorizations by which parties do not simply accept the abstract possibility of formulating reservations but determine in advance exactly which reservations may be made. On the one hand, a reservation made pursuant to a reservations clause that authorizes the parties simply to exclude the application of a provision[2051] or an entire part of the treaty[2052] must be deemed to be an "expressly authorized reservation". In this case, the other contracting States and contracting organizations can see exactly, at the time the treaty is concluded, what contractual relations they will have with the parties that exercise the option of making reservations pursuant to the exclusion clause. On the other hand, "negotiated"[2053] reservations can also be regarded as specified reservations. Indeed, certain international conventions do not merely authorize States parties to make reservations to one provision or another but contain an exhaustive list of reservations from among which States must make their choice.[2054] This procedure also allows contracting States and contracting organizations to gauge precisely and *a priori* the impact and effect of a reservation on treaty relations. By expressing its consent to

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[2049] Decision of 30 June 1977, footnote 24 above, p. 32, para. 39.

[2050] F. Horn, footnote 25 above, p. 133.

[2051] See, for example, article 20, paragraph 1, of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws: "Any High Contracting Party may, when signing or ratifying the present Convention or acceding thereto, append an express reservation excluding any one or more of the provisions of Articles 1 to 17 and 21." Treaties often authorize a reservation excluding the application of a provision concerning the settlement of disputes (see P.-H. Imbert, footnote 25 above, p. 169 (note 27) and R. Riquelme Cortado, footnote 150 above, pp. 135–136).

[2052] See article 38 of the Revised General Act for the Pacific Settlement of International Disputes of 1949, or article 34 of the European Convention for the Peaceful Settlement of Disputes of 1957. The Convention concerning Minimum Standards of Social Security, No. 102, of the International Labour Organization (ILO) combines, moreover, this possibility of rejecting the application of entire chapters with a minimum number of chapters that must actually be applied (art. 2) (see also article 2 of ILO Convention No. 128 concerning Invalidity, Old-Age and Survivors' Benefits, article 20 of the European Social Charter or article 2 of the European Code of Social Security of 1964). See also R. Riquelme Cortado, footnote 150 above, p. 134.

[2053] Regarding this notion, see also paragraph (10) of the commentary on guideline 1.1.6. See also W.P. Gormley, footnote 115 above, pp. 75–76; and P.-H. Imbert, footnote 25 above, pp. 196–199.

[2054] For Council of Europe practice, see R. Riquelme Cortado, footnote 150 above, pp. 130–131.

be bound by the treaty, a State or an international organization consents to any reservations permitted by the "list".

(10) In these two cases, the content of the reservation is sufficiently predetermined by the treaty for these reservations to be able to be considered "expressly authorized" within the meaning of article 20, paragraph 1, of the Vienna Conventions. The contracting States and contracting organizations are aware in advance of the treaty relations that result from the formulation of such a reservation and have agreed to it in the actual text of the treaty. There is no surprise, and the principle of consent is not undermined.

(11) The Commission has, moreover, developed a criterion for distinguishing among the different categories of specified reservations in defining the notion of expressly authorized reservations in its guideline 3.1.4 (Permissibility of specified reservations). Pursuant to this provision:

> "Where the treaty envisages the formulation of specified reservations without defining their content, a reservation may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty."

A contrario, a specified reservation whose content is fixed in the treaty is considered *ipso facto* permissible and, given the provision expressly authorizing them, established.

(12) Paragraph 1 of guideline 4.1.1 reproduces the text of article 20, paragraph 1, of the 1986 Vienna Convention. While this reminder may not be strictly necessary, especially since the principle laid out follows from a close reading of guideline 4.1 and paragraph 2 of guideline 4.1.1, it is in line with the Commission's established and consistent practice of incorporating the provisions of the Convention in the Guide to Practice, to the extent possible. This is also why the Commission has not changed the wording despite the fact that the phrase "unless the treaty so provides" seems self-evident.[2055]

(13) Paragraph 2 of guideline 4.1.1 sets forth the specific rule that applies to the establishment of reservations expressly authorized by the treaty as an exception to the general rule established in guideline 4.1, laying down the single condition to be met for an expressly authorized reservation to be established: it must be formulated in accordance with the required form and procedures.[2056]

(14) In both paragraphs, as indeed in all the provisions that use the term, "contracting States and contracting organizations" covers three possible scenarios: one in which only States are involved; more exceptionally, one in which international organizations alone are contracting; and the intermediate hypothesis, in which contracting States and contracting organizations are both involved.

(15) It should also be emphasized that, once it has been clearly established that a particular reservation falls under article 20, paragraph 1, not only is its acceptance by the other parties unnecessary, but the parties are deemed to have effectively and definitively accepted it, with all the consequences that follow therefrom. One of the consequences of this particular regime is that the other parties cannot object to such a reservation.[2057] Accepting this type of reservation in advance in the text of the treaty itself effectively prevents the contracting States and contracting organizations from subsequently making an objection, as "[t]he Parties have

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[2055] However, see the explanation given by Sir Humphrey Waldock, footnote 2036 above; see also D Müller, *Commentaire de l'article 21 (1969)* footnote 49 above, p. 888, para. 7; and D. Müller, 1969 Vienna Convention Article 21, footnote 49 above, pp. 540–541, para. 7.

[2056] For the exact meaning of the required "procedures", see footnote XXX above.

[2057] D.W. Bowett, footnote 150 above, p. 84; M. Coccia, footnote XXX above, p. 9.

already agreed that the reservation is permissible and, having made its permissibility the object of an express agreement, the Parties have abandoned any right thereafter to object to such a reservation".[2058] An amendment[2059] proposed by France at the Vienna Conference expressed exactly the same idea, but was not adopted by the Drafting Committee. Guideline 2.8.13 (Final nature of acceptance of a reservation) is therefore applicable *a fortiori* to expressly authorized reservations. They are deemed to have been accepted, and consequently there can be no objection to them.

4.1.2 Establishment of a reservation to a treaty which has to be applied in its entirety

When it appears, from the limited number of negotiating States and organizations and the object and purpose of the treaty, that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation to this treaty is established with regard to the other contracting States and contracting organizations if it is permissible and was formulated in accordance with the required form and procedures, and if all the contracting States and contracting organizations have accepted it.

Commentary

(1) A special case provided for in article 20, paragraph 2, of the Vienna Conventions is that of treaties which must be applied in their entirety. Paragraph 2 provides that the flexible system shall not apply to any treaty whose application in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty. In such cases, a reservation requires acceptance by all the parties.

(2) Fitzmaurice made a distinction between plurilateral treaties, which were in his view closer to bilateral treaties, and multilateral treaties;[2060] however, it was only in Waldock's first report that the usefulness of such a distinction became clearly apparent. What is now article 20, paragraph 2, resulted from a compromise between the members of the Commission who remained deeply convinced of the virtues of the traditional system of unanimity and the proponents of Waldock's flexible system.[2061] At the time, the paragraph represented the last bastion which the proponents of unanimity refused to give up. The principle behind article 20, paragraph 2, no longer gave rise to debate either in the Commission during the second reading of the Waldock draft or at the Vienna Conference.

(3) However, the main issue is not the principle of unanimity. Rather, the question is how to determine which treaties are subject to the safeguard clause and are therefore excluded from the flexible system. Until 1965, the (limited) number of parties was the only criterion referred

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[2058] D.W. Bowett, *ibid.*, pp. 84–85.

[2059] A/CONF.39/C.1/L.169. Paragraph 2 of the single article that, according to the French proposal, was to replace articles 16 and 17 of the International Law Commission draft provided that "a reservation expressly authorized by the treaty cannot be the subject of an objection by other contracting States, unless the treaty so provides", *Documents of the Conference*, (footnote 54 above, p. 133).

[2060] See his first report on the law of treaties (A/CN.4/101), *Yearbook ... 1956*, vol. II, p. 127, para. 97.

[2061] The Special Rapporteur stressed that "paragraph [4] and paragraph 2 represented the balance on which the whole article was based" (*Yearbook ... 1962*, vol. I, 664th meeting, 19 June 1962, p. 230, para. 17). See also the statements made by Gros (*ibid.*, 663rd meeting, 18 June 1962, pp. 228 and 229, para. 97) and Ago (*ibid.*, p. 228, para. 87).

to by the special rapporteurs and the Commission.[2062] Waldock's fourth report took into account the criticisms levelled against that criterion and recognized that "to find a completely precise definition of the category of treaties in issue is not within the bounds of possibility".[2063] At the same time, he proposed a reference to the intention of the parties: "the application of its provisions between all the parties is to be considered an essential condition of the treaty".[2064] The parties' intention to preserve the integrity of the treaty was therefore the criterion for ruling out the flexible system and retaining the traditional unanimity system. The Commission adopted that idea, making minor drafting changes to what would become the present paragraph 2.[2065]

(4) It is worth noting, however, that the new provision addresses a completely different category of treaty than had been envisaged before 1962. The reference to intention has two advantages. First, it allows the flexible system to extend to treaties which, although concluded by only a small number of States, are otherwise more akin to general multilateral treaties. Second, it excludes treaties that have been concluded by a more significant number of States, but whose very nature requires that the integrity of the treaty be preserved. The concept of the "plurilateral" treaty has therefore shifted towards that of a treaty whose integrity must be ensured.[2066]

(5) The criterion of number was never completely discarded, and is still contained in article 20, paragraph 2. However, its function has changed: whereas prior to 1965 it was the sole factor in determining whether or not a given treaty was subject to the flexible system, its purpose is now to shed light on the intention of the parties. As a result, it now carries less weight in determining the nature of a treaty, having become an auxiliary criterion in this respect while unfortunately remaining somewhat imprecise and difficult to apply.[2067]

(6) Waldock proposed other "auxiliary" criteria that could assist in the intrinsically problematic task of establishing the parties' intentions. In his fourth report, he also mentioned the nature of the treaty and the circumstances of its conclusion.[2068] The change was never explained, and despite the proposals of the United States, which pressed for the definition to refer to the nature of the treaty,[2069] the object and purpose of the treaty was the only other "auxiliary" criterion adopted by the Commission and subsequently at the Vienna Conference. The criterion of the object and purpose of the treaty,[2070] like the criterion of number, is far

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[2062] This is true of G.G. Fitzmaurice (draft article 38 in the first report on the law of treaties, A/CN.4/101, *Yearbook ... 1956*, vol. II, p. 115) and of Waldock (draft article 1 (d), first report on the law of treaties, A/CN.4/144, *Yearbook ... 1962*, vol. II, p. 221). Draft article 20, para. 3, which was adopted by the Commission on first reading in 1962, refers to treaties concluded "between a small group of States" (*Yearbook ... 1962*, vol. II, p. 176).

[2063] Document A/CN.4/177 and Add.1 and 2, *Yearbook ... 1965*, vol. II, p. 51, para. 7.

[2064] Draft article 19, para. 2, *ibid.*, p. 50.

[2065] See *Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, pp. 258–260, paras. 36–53, and *ibid.*, 816th meeting, 2 July 1965, pp. 283 and 284, paras. 43–49.

[2066] P.-H. Imbert, footnote 25 above, p. 115.

[2067] See in particular the criticisms made by P.-H. Imbert, *ibid.*, pp. 112–113. See also the United States proposal at the Vienna Conference to delete any reference to criteria other than intention, owing to those difficulties, *First Session, Summary records*, footnote 35 above, 21st meeting, 10 April 1968, p. 108, para. 9.

[2068] A/CN.4/177 and Add.1 and 2, *Yearbook ... 1965*, vol. II, p. 51, para. 7.

[2069] See amendment A/CONF.39/C.1/L.127, *Documents of the Conference*, footnote 54 above, p. 135.

[2070] See guidelines 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty) and 3.1.5.1 (Determination of the object and purpose of the treaty). In its advisory opinion of 24 September 1982, the Inter-American Commission on Human Rights found that "Paragraph 2 from clear-cut, and it has even been suggested that, rather than clarifying the interpretation of paragraph 2, it renders it even more vague and subjective.[2071]

(7) Furthermore, paragraph 2 of article 20 is unclear, or at any rate difficult to interpret, not only in respect of its scope, but also in respect of the applicable legal regime. Under paragraph 2, reservations require acceptance by all parties. Only two things can be deduced for certain. First, such reservations are not subject to the flexible system set forth in paragraph 4; indeed, paragraph 4 confirms that view, in that it applies only to "cases not falling under the preceding paragraphs". Secondly, the reservations are indeed subject to unanimous acceptance: they must be accepted "by all the parties".

(8) However, paragraph 2 of article 20 does not clearly state who must actually accept the reservation. The text does refer to "the parties", but this is hardly satisfactory. It is questionable whether the acceptance of a reservation by all "parties" only should be a condition, a "party" being defined under article 2, paragraph 1 (g), as "a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force". That would contradict the underlying idea, which is that the treaty should be implemented in its entirety by all current and future parties. To argue otherwise would, in no small measure, deprive unanimous consent of its meaning.

(9) Moreover, although article 20, paragraph 5, connects the principle of tacit or implied consent to paragraph 2, it remains a mystery how implied acceptance could apply to the treaties referred to in the latter provision. It follows from article 20, paragraph 5, that a contracting State or contracting organization may make an objection only on becoming a party to the treaty. A signatory State or signatory organization could thus block unanimous acceptance even without formulating a formal objection to the reservation, because it would be impossible to presume that State's assent before the 12-month deadline elapsed. The presumption in article 20, paragraph 5, would therefore have the exact opposite of the desired effect, namely the rapid stabilization of treaty relations and of the status of the reserving State *vis-à-vis* the treaty.[2072] For precisely that reason, the Special Rapporteur argued in 1962 that where States not yet parties to a treaty are concerned,

> "[t]his qualification of the rule is not possible in the case of plurilateral treaties because there the delay of taking a decision does place in suspense the status of the reserving State vis-à-vis all the States participating in the treaty".[2073]

(10) Such lacunae and inconsistencies are particularly surprising given that draft article 18 as proposed by Waldock in 1962 made a clear distinction between the tacit or implied acceptance of "plurilateral treaties" on the one hand and of multilateral treaties on the other hand.[2074] While these clarifications specified the legal regime for the treaties referred to in article 20, paragraph 2, perfectly well, they were nevertheless sacrificed in order to make the provisions on reservations less complex and more succinct.

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of Article 20 is inapplicable, inter alia, because the object and purpose of the Convention is not the exchange of reciprocal rights between a limited number of States, but the protection of the human rights of all individual human beings within the Americas, irrespective of their nationality" (see footnote 2029 above, para. 27).

[2071] See C. Tomuschat, footnote 1084 above, p. 479; P.-H. Imbert, footnote 25 above, pp. 114–115.

[2072] See D. Müller, *Commentaire de l'article 20 (1969)*, footnote 1087 above, pp. 820–821, paras. 46–47; and 1969 Vienna Convention Article 20, footnote 1087 above, pp. 502–503, paras. 41–42.

[2073] See Sir Humphrey Waldock, first report on the law of treaties, *Yearbook ... 1962*, vol. II, p. 67, para. (16).

[2074] *Ibid.*, vol. II, pp. 61–62.

(11) In an attempt to remove such uncertainties, guideline 4.1.2 clearly specifies that, where this type of treaty is concerned, a reservation is established only "if all the contracting States and contracting organizations have accepted it", by which is meant all the States and international organizations that have already ratified the treaty or do so within the 12-month period following the formulation of the reservation.

(12) The relatively complex wording that the Commission adopted for guideline 4.1.2 is the result of its desire to follow the wording of article 20, paragraph 2, as closely as possible, while also giving a complete list of the conditions that must be met for reservations to the treaties in question to be established, following the pattern of guideline 4.1.

(13) The two criteria adopted for establishing that a treaty is of the type that "has to be applied in its entirety" (a limited number of negotiating States and organizations, and the object and purpose of the treaty) are indicative but not necessarily cumulative or exhaustive.

4.1.3 Establishment of a reservation to a constituent instrument of an international organization

When a treaty is a constituent instrument of an international organization, a reservation to this treaty is established with regard to the other contracting States and contracting organizations if it is permissible and was formulated in accordance with the required form and procedures, and if it has been accepted in conformity with guidelines 2.8.8 to 2.8.11.

Commentary

(1) The third — and final — exception to the flexible regime set out in article 20, paragraph 4, of the Vienna Conventions is provided for by paragraph 3 of that article and relates to constituent instruments of international organizations. Under the terms of the provision:

> "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization."

(2) A simple perusal of this provision shows that, in order to be established, a reservation to the constituent instrument of an international organization calls for the acceptance of the competent organ of the organization. The modalities for formulating such acceptance are the subject of guidelines 2.8.8 to 2.8.11, the commentaries to which explain the meaning and describe the *travaux préparatoires* for this provision.

(3) It does not appear necessary to recall once again the reasons that led the Commission and the Conference to adopt the provisions contained in article 20, paragraph 3, of the Vienna Conventions. Although guideline 2.8.8 is sufficient to express the need for the acceptance of the competent organ of the organization, the Commission considered that it was worth recalling this particular requirement in the section dealing with the effects of reservations, given that the acceptance of the competent organ is the *sine qua non* for the establishment of a reservation to the constituent instrument of an international organization. Only this collective acceptance can enable the reservation to produce all its effects. The individual acceptance of

the other members of the organization, while clearly not prohibited, has no effect on the establishment of the reservation.[2075]

4.2 Effects of an established reservation

Commentary

(1) A reservation "established" within the meaning of section 4.1 produces all the effects intended by its author, that is to say, to echo the wording of guideline 1.1, it excludes or modifies "the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects". At that point, the object of the reservation as desired or "purported" by its author is achieved.

(2) However, modifying or excluding the legal effect of one or more provisions of the treaty is not the only result of the establishment of the reservation; it also constitutes the author of the reservation a contracting State or a contracting organization to the treaty. Following the establishment of the reservation, the treaty relationship is established between the author of the reservation and the contracting States or contracting organizations with regard to which the reservation is established, and this has consequences in terms of the status of the contracting State or contracting organization (guideline 4.2.1), the entry into force of a treaty (guideline 4.2.2), the existence of a treaty relationship between the author of the reservation and the parties with regard to which the reservation is established (guideline 4.2.3) and the resultant treaty relations (guidelines 4.2.4 and 4.2.5).

4.2.1 Status of the author of an established reservation

As soon as a reservation is established in accordance with guidelines 4.1 to 4.1.3, its author becomes a contracting State or contracting organization to the treaty.

Commentary

(1) The establishment of the reservation has a number of consequences for its author relating to the very existence of the treaty relationship and the author's status in relation to the other contracting States or contracting organizations. It may even result in the entry into force of the treaty for all of the contracting States or contracting international organizations. These consequences follow directly from article 20, paragraphs 4 (a) and (c), of the Vienna Conventions. The first of these provisions relates to the establishment of treaty relations between the author of the reservation and the contracting State or contracting organization which has accepted it (hence, the contracting State or contracting organization with regard to which or by which the reservation is established); the second relates to whether the consent of the reserving State or reserving international organization takes effect, or in other words whether the author of the reservation becomes a contracting State or contracting organization to the treaty. In the 1986 Convention these provisions read as follows:

[2075] See guideline 2.8.12 (Reaction by a member of an international organization to a reservation to its constituent instrument). Guideline 2.8.10 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.

> 4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:
>
> (a) Acceptance of a reservation by a contracting State or by a contracting organization constitutes the reserving State or international organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force for the reserving State and for the accepting State or organization;
>
> (b) ...
>
> (c) An act expressing the consent of a State or of an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one contracting State or one contracting organization has accepted the reservation.

(2) The Commission's commentary to draft article 17 (which became article 20) clearly explains the intent of these provisions:

> "Paragraph 4 contains the three basic rules of the flexible system which are to govern the position of the contracting States in regard to reservations to any multilateral treaties not covered by the preceding paragraphs. Subparagraph (a) provides that acceptance of a reservation by another contracting State constitutes the reserving State a party to the treaty in relation to that State if or when the treaty is in force. […].[2076] Subparagraph (c) then provides that an act expressing the consent of a State to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation. This provision is important since it determines the moment at which a reserving State may be considered as a State which has ratified, accepted or otherwise become bound by the treaty."[2077]

(3) Article 20, paragraph 4 (a), of the 1969 Vienna Convention (the gist of which is reproduced in guideline 4.2.3) does not resolve the issue of the date on which the author of the reservation may be considered to have joined the group of contracting States or contracting international organizations. Paragraph 4 (c) was inserted into the Convention by the Commission in order to fill that gap. As Waldock explained in his fourth report:

> "The point is not purely one of drafting, since it touches the question of the conditions under which a reserving State is to be considered a 'party' to a multilateral treaty under the 'flexible' system. Indeed, not only the Australian but also the Danish Government urges the Commission to deal explicitly with that question, since it may affect the determination of the date on which the treaty comes into force and may otherwise be of concern to a depositary. The Special Rapporteur understands the position under the 'flexible' system to be that a reserving State is to be considered as a 'party' if and at the moment when another State which has established its consent to be bound by the treaty accepts the reservation either expressly or tacitly under paragraph 3 of the existing article 19 (paragraph 4 of the new article 20 as given below)."[2078]

[2076] Subparagraph (b) primarily concerns the effects of an objection to a valid reservation. In this connection see below section 4.3 of the Guide to Practice and, in particular, guidelines 4.3.1 (Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation) and 4.3.5 (Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect).

[2077] *Yearbook ... 1966*, vol. II, p. 207, para. (21) of the commentary.

[2078] *Yearbook ... 1965*, vol. II, pp. 52–53, para 11.

(4) What can be determined with certainty is whether and when the author becomes a contracting State or contracting organization, in other words, if it has "consented to be bound by the treaty, whether or not the treaty has entered into force" (article 2, paragraph 1 (f)). That is precisely the subject of article 20, paragraph 4 (c), which merely states that the "act expressing [the author of the reservation's] consent to be bound by the treaty and containing a reservation *is effective* when at least one other contracting State has accepted the reservation".[2079]

(5) Although the general rule seems to be clearly established by article 20, paragraph 4 (c), of the Vienna Conventions — the author of a reservation becomes a contracting State or contracting organization as soon as its valid reservation has been accepted by at least one contracting State or one contracting organization — its practical application is far from being consistent, let alone uniform. The main actors involved in applying this rule, that is, depositaries, have almost always applied it in a very approximate manner.

(6) The Secretary-General of the United Nations, in his capacity as depositary of multilateral treaties, for example, agrees that any instrument expressing consent to be bound by a treaty which is accompanied by a reservation may be deposited and, refusing to adopt a position on the issue of the validity or effects of the reservation, "indicates the date on which, in accordance with the treaty provisions, the instrument would normally produce its effect, leaving it to each party to draw the legal consequences of the reservations that it deems fit".[2080] In other words, the Secretary-General does not wait for at least one acceptance to be received before accepting the definitive deposit of an instrument of ratification or accession accompanied by a reservation, but treats such instruments in the same way as any other ratification or accession that is not accompanied by a reservation.

> "Since he is not to pass judgment, the Secretary-General is not therefore in a position to ascertain the effects, if any, of the instrument containing reservations thereto and, *inter alia*, to determine whether the treaty enters into force as between the reserving State and any other State, or *a fortiori* between a reserving State and an objecting State if there have been objections. As a consequence, if the final clauses of the treaty in question stipulate that the treaty shall enter into force after the deposit of a certain number of instruments of ratification, approval, acceptance or accession, the Secretary-General as depositary will, subject to the considerations in the following paragraph, include in the number of instruments required for entry into force all those that have been accepted for deposit, whether or not they are accompanied by reservations and whether or not those reservations have met with objections."[2081]

(7) This position has been criticized[2082] in view of the content of article 20, paragraph 4 (c), of the Vienna Conventions (read in conjunction with article 20, paragraph 5). It has been justified by the Secretary-General by the fact that:

> "no objection had ever in fact been received from any State concerning an entry into force that included States making reservations. Finally, for a State's instrument not to be counted, it might conceivably be required that all other contracting States, without exception, would have not only objected to the participation of the reserving State, but

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[2079] Emphasis added.

[2080] United Nations, *Summary of practice* ..., footnote 75 above, para. 187.

[2081] *Ibid.*, para. 184.

[2082] See P.-H. Imbert, footnote 601 above, pp. 524–541; G. Gaja, footnote 28 above, pp. 323–324; R. Riquelme Cortado, footnote 150 above, pp. 245–250; or D. Müller, "Article 20 (1969)", footnote 1087 above, pp. 821 and 822, para. 48; 1969 Vienna Convention Article 20, footnote 1087 above, pp. 503–504, para. 43.

> that those objecting States would all have definitely expressed their intention that their objection would preclude the entry into force of the treaty as between them and the reserving State".[2083]

(8) To give a recent example, Pakistan acceded to the International Convention for the Suppression of the Financing of Terrorism through a notification dated 17 June 2009. That instrument was accompanied by reservations to articles 11, 14 and 24 of the Convention.[2084] Despite these reservations, the Secretary-General noted in his depositary notification of 19 June 2009 that:

> "The Convention will enter into force for Pakistan on 17 July 2009 in accordance with its article 26 (2) which reads as follows:
>
>> 'For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.'"[2085]

Pakistan's instrument is therefore considered by the depositary as taking immediate effect, notwithstanding article 20, paragraph 4 (c), of the 1969 Vienna Convention. For the depositary, Pakistan is one of the contracting States, indeed one of the parties, to the International Convention for the Suppression of the Financing of Terrorism, independently of whether its reservations have been accepted by at least one other contracting State.[2086]

(9) This practice, which seems to have been followed for many years and which existed well before the adoption of the 1969 Vienna Convention, has also been followed by other depositary institutions or States. Thus, depositaries as diverse as the Dominican Republic and the Council of Europe replied in 1965 to the Secretary-General's questionnaire with respect to depositary practice in relation to reservations[2087] that a reserving State was "immediately counted among the number of countries necessary for bringing the convention into force"[2088] – in other words as soon as it had expressed its consent to be bound, even when accompanying it with a reservation. Other depositaries, including the United States of America, the Organization of American States and the Food and Agriculture Organization of the United

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[2083] United Nations, *Summary of practice* ..., footnote 75 above, para. 186.

[2084] *Multilateral Treaties* ..., chap. XVIII.11.

[2085] Depositary notification No. C.N.371.2009.TREATIES-1, available from http://treaties.un.org *Depositary Notifications*.

[2086] See also, for example, the reservation of El Salvador accompanying its ratification on 27 May 2008 of the Stockholm Convention on Persistent Organic Pollutants. The depositary notification of the Secretary-General of 25 August 2008 states that El Salvador will be considered to be a State party on "the ninetieth day after the date of deposit of such State or regional economic integration organization of its instrument of ratification, acceptance, approval or accession", in accordance with article 26 of the Convention (C.N.436.2008.TREATIES-5, *ibid.*); or the declaration of the Islamic Republic of Iran accompanying its act of accession to the Convention on the Rights of Persons with Disabilities and the depositary notification relating thereto (C.N.792.2009.TREATIES-37, *ibid.*); the reservations of Pakistan to the Convention against Torture accompanying its instrument of accession (deposited on 23 June 2010; depositary notification C.N.406.2010.TREATIES-1); and the reservation of Uzbekistan to the Agreement Establishing the International Fund for Agricultural Development accompanying the act of accession of 19 February 2011 (depositary notification C.N.78.2011.TREATIES-1).

[2087] *Depositary practice in relation to reservations: Report by the Secretary-General submitted in accordance with General Assembly resolution 1452 B (XIV), Yearbook ... 1965*, vol. II, p. 98.

[2088] *Ibid.*

Nations, reported a more nuanced practice, in principle not counting reserving States as contracting States.[2089]

(10) Without intending to take a position on the merits of this practice,[2090] the Commission is of the view that, although application of article 20, paragraph 4 (c), of the Vienna Conventions is inconsistent, to say the least, the rule expressed in this provision has not lost its authority. It is certainly part of the reservations regime established by the 1969 and 1986 Vienna Conventions, which the Commission decided, as a matter of principle, to complement rather than contradict.[2091] According to the terms of article 20, paragraph 4 (c), of the Vienna Conventions, the author of a reservation does not become a contracting State or organization until at least one other contracting State or one other contracting organization accepts the reservation, either expressly — which seldom occurs — or tacitly on expiration of the time period set by article 20, paragraph 5, and referred to in guidelines 2.6.12 (Time period for formulating an objection) and 2.8.1 (Tacit acceptance of reservations). In the worst case, the consequence of strict application of this provision is a delay of 12 months in the entry into force of the treaty for the author of the reservation. This delay may certainly be considered undesirable; nevertheless, it is caused by the author of the reservation, and it can be reduced by express acceptance of the reservation on the part of a single other contracting State or a single other contracting international organization.

(11) This is the general case. However, the wording of guideline 4.2.1 covers both the general case and the special situations covered by article 20, paragraphs 1, 2 and 3, of the Vienna Conventions. That is why guideline 4.2.1 does not simply echo the sole condition of acceptance by another contracting State or contracting organization, but speaks of the establishment of a reservation.[2092] That wording makes it possible, for example, to cover, in the same guideline, reservations whose establishment does not require acceptance by another party because express provision is made for them in the treaty.[2093] A reservation thus established will constitute the author of the reservation a contracting State or contracting organization.

(12) This was the reasoning followed, for example, by the Inter-American Court of Human Rights in its advisory opinion of 1982, in which it concluded that a reserving State became a contracting State or a contracting organization as from the date of ratification. Admittedly the reasoning rests on a fairly broad interpretation of the notion of "reservation expressly authorized" (art. 20, para. 1).[2094] The conclusion reached regarding the effects of a reservation thus established is, however, uncontroversial:

> "Accordingly, for the purpose of the present analysis, the reference in Article 75 to the Vienna Convention makes sense only if it is understood as an express authorization designed to enable States to make whatever reservations they deem appropriate, provided the reservations are not incompatible with the object and purpose of the treaty. As such, they can be said to be governed by Article 20 (1) of the Vienna

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[2089] *Ibid.*

[2090] See below, guideline 4.2.2 and paragraph (4) of the commentary.

[2091] *Yearbook ... 1995*, vol. II (Part Two), pp. 107–108, para. 481 and para. (6) of the Introduction to this Guide to Practice.

[2092] See also the commentary to guideline 4.2.3, paragraphs (2) and (3).

[2093] See guideline 4.1.1 and paragraphs (1) and (15) of the commentary thereto.

[2094] Inter-American Court of Human Rights, Advisory Opinion OC-228, 24 September 1982, *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights*, para. 36.

Convention and, consequently, do not require acceptance by any other State Party."[2095]

(13) In the light of these considerations, the Commission has decided to include in the Guide to Practice guideline 4.2.1, which expresses the idea of article 20, paragraph 4 (c), rather than reproducing it word for word. As soon as a reservation is established within the meaning of guidelines 4.1 to 4.1.3, the instrument of ratification or accession of the author of the reservation takes effect and constitutes the author a contracting State or a contracting organization. This has the result that the author of the reservation becomes a contracting State or contracting organization, with the ensuing consequences, if the treaty is not yet in force,[2096] or a party to the treaty if it has already entered into force or comes into force by virtue of its instrument expressing consent to be bound.[2097]

4.2.2 Effect of the establishment of a reservation on the entry into force of a treaty

1. When a treaty has not yet entered into force, the author of a reservation shall be included in the number of contracting States and contracting organizations required for the treaty to enter into force once the reservation is established.

2. The author of the reservation may however be included at a date prior to the establishment of the reservation in the number of contracting States and contracting organizations required for the treaty to enter into force, if no contracting State or contracting organization is opposed.

Commentary

(1) When applying the general rule set forth in guideline 4.2.1, a distinction must be drawn according to whether the treaty is not in force – a situation which may give rise to some fairly complex issues, which are dealt with in guideline 4.2.2 — or is in force — a much easier situation, which is addressed in guideline 4.2.3.

(2) Indeed, if the treaty has not yet entered into force, the establishment of the reservation and the validity of the instrument through which the author of the reservation has expressed consent to be bound by the treaty may have the consequence that the treaty enters into force for all contracting States and organizations, including the author of the reservation. That is the case if, following the establishment of the reservation, the addition of the author to the number of contracting parties has the result that the conditions for the entry into force of the treaty are fulfilled. This result depends heavily on the circumstances of the case, and in particular on the conditions for the entry into force of the treaty as established by its final clauses, the number of contracting States and contracting organizations, etc. It is thus scarcely possible to derive a general rule in this respect except that the author of the established reservation should be included in the number of contracting States or organizations that determines the entry into force of the treaty. This is the principle established by guideline 4.2.2, paragraph 1.

(3) The purpose of paragraph 2, on the other hand, is to take into account — without passing judgment on its merits — what is probably the predominant practice of depositaries (and is, in any case, the practice of the Secretary-General of the United Nations, described above),[2098] which is to consider the author of the reservation to be a contracting State or

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[2095] *Ibid.*, para. 35.

[2096] See guideline 4.2.2.

[2097] See guideline 4.2.3.

[2098] Paragraphs (6) to (10) of the commentary to guideline 4.2.1.

contracting organization as soon as the instrument expressing its consent to be bound has been deposited and without taking into account the validity or the invalidity of the reservation.

(4) The drafting of this second paragraph was prompted by a desire to take into consideration a practice which, up until now, does not seem to have caused any particular difficulties, while not calling into question the very clear rule, scarcely open to divergent interpretations, which is laid down in article 20, paragraph 4 (c), of the Vienna Conventions. A mere reference to the possibility of parties reaching an agreement contrary to this rule would not have been sufficient to reconcile these two concerns: quite apart from the fact that all the guidelines in the Guide to Practice are only indicative and parties remain free to depart from them by (valid) agreement *inter se*, it is extremely doubtful whether an agreement could be said to have come about merely because the other parties all remain silent. In this spirit, the International Court of Justice, in its advisory opinion of 1951, refused to consider that the mere fact of using an institutional depositary meant agreement with all the depositary's rules and practices:

> "It must be pointed out, first of all, that the existence of an administrative practice does not in itself constitute a decisive factor in ascertaining what views the contracting States to the Genocide Convention may have had concerning the rights and duties resulting therefrom."[2099]

The Commission likewise did not consider it wise to refer to the depositary's habitual practice without further clarification,[2100] for that might entrench and encourage the use of such practices, which contradicted the letter and spirit of article 20, paragraph 4 (c), of the Vienna Conventions.

(5) The formula chosen, which is reflected in the addition of a second paragraph, merely describes the practice of certain depositaries as an alternative to the rule. The expression "may however be included" reflects the optional nature of this divergent practice, whereas the final qualification "if no contracting State or contracting organization is opposed" safeguards the application of the principle set out in paragraph 1 should any one contracting State or contracting organization be opposed to that inclusion.

(6) The phrase "at an earlier date" seeks to preserve broad flexibility for practice in the future and, for example, the possibility, not of eliminating any time lag whatsoever between the expression of the consent of the author of the reservation to be bound by the treaty and the acquisition of the status of contracting State or contracting organization, but of reducing it to less than one year. But in such case, the practice would remain subject to the principle of non-objection.

4.2.3 Effect of the establishment of a reservation on the status of the author as a party to the treaty

The establishment of a reservation constitutes its author a party to the treaty in relation to contracting States and contracting organizations in respect of which the reservation is established if or when the treaty is in force.

[2099] *I.C.J. Reports 1951*, footnote 604 above, p. 25.

[2100] Moreover it provided this clarification; see guideline 2.3.1 (Acceptance of the late formulation of a reservation): "Unless the treaty otherwise provides *or the well-established practice followed by the depositary differs*, the late formulation of a reservation shall only be deemed to have been accepted if no contracting State or contracting organization has opposed such formulation after the expiry of the 12-month period following the date on which notification was received" (emphasis added).

Commentary

(1) The rule that the acceptance of a valid reservation establishes a treaty relationship between the author of the reservation and the State or international organization that has accepted it makes good sense. It appears in various forms in the drafts of all the special rapporteurs on the law of treaties. The only difference between Waldock's approach and that of his predecessors lies in the number of acceptances needed in order to produce this effect. The first three special rapporteurs, staunch advocates of the traditional regime of unanimity, did not consider a treaty relationship established until all the other contracting States and contracting organizations had accepted the reservation. In Waldock's flexible approach, each State (or international organization) not only decides for itself whether a reservation is opposable to it or not; that individual acceptance also produces its effects independently of the reactions of the other States or international organizations, although, logically, only in the bilateral relations between the author of the reservation and the author of the acceptance. The Commission explained in its commentary to draft article 20 as adopted on first reading that the application of this flexible system could:

> "certainly have the result that a reserving State may be a party to the treaty with regard to State X, but not with regard to State Y, although States X and Y are mutually bound by the treaty. But in the case of a general multilateral treaty or of a treaty concluded between a considerable number of States, this result appears to the Commission not to be as unsatisfactory as allowing State Y, by its objection, to prevent the treaty from coming into force between the reserving State and State X, which has accepted the reservation".[2101]

(2) This system of "relative" participation in the treaty[2102] is applicable, however, only in the "normal" instance of establishment of the reservation. Clearly, it cannot be applied in cases where unanimous acceptance is required in order to establish a reservation. For such a reservation to be able to produce its effects, including the entry into force of the treaty for the author of the reservation, all of the contracting States and contracting organizations must have consented to the reservation.[2103] Consequently, the treaty necessarily enters into force in the same way for all of the contracting States and contracting organizations, on the one hand, and the author of the reservation, on the other hand. A comparable solution is necessary in the case of a reservation to the constituent instrument of an international organization; only the acceptance of the competent organ can establish the reservation and constitute its author one of the circle of contracting States and contracting organizations.[2104] Once this acceptance is obtained, the author of the reservation establishes treaty relations with all the other contracting States and contracting organizations without their individual consent being required.

(3) In the light of these comments it should, however, be noted that once the reservation is established, in conformity with the rules set out in guidelines 4.1 to 4.1.3, depending on the nature of the reservation and the characteristics of the treaty, a treaty relationship is formed between the author of the reservation and the contracting State or States (or contracting organization or organizations) in respect of which the reservation is established: the contracting State or contracting organization which has accepted the reservation (in the "normal" case), and all the contracting States and contracting organizations (in the other cases). It thus suffices to recall this rule, which constitutes the core of the Vienna regime,

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[2101] *Yearbook ... 1962*, vol. II, p. 181, para. (23) of the commentary. See also *Yearbook ... 1966*, vol. II, pp. 207–208, para. (22) of the commentary to draft article 17.

[2102] *Yearbook ... 1966*, vol. II, pp. 207–208, para. (22) of the commentary to draft article 17.

[2103] See above guideline 4.1.2.

[2104] See above guideline 4.1.3.

without any need to distinguish again between the general rule and the exceptions to it, as the wording of guidelines 4.1 to 4.1.3 makes it possible to determine in respect of whom the reservation is established and with whom the treaty relationship is constituted.

(4) Guideline 4.2.3 draws the consequences of this principle — which is enunciated in guideline 4.2.1 — if the treaty is in force (or enters into force pursuant to guideline 4.2.2 or for another reason). In that case, it goes without saying that the author of an established reservation thereby becomes a party to the treaty within the meaning of article 2, paragraph 1 (g), of the 1986 Vienna Convention and not just a contracting State or contracting organization as defined in paragraph 1 (f) of the same article.

4.2.4 Effect of an established reservation on treaty relations

1. A reservation established with regard to another party excludes or modifies for the reserving State or international organization in its relations with that other party the legal effect of the provisions of the treaty to which the reservation relates or of the treaty as a whole with respect to certain specific aspects, to the extent of the reservation.

2. To the extent that an established reservation excludes the legal effect of certain provisions of a treaty, the author of that reservation has neither rights nor obligations under those provisions in its relations with the other parties with regard to which the reservation is established. Those other parties shall likewise have neither rights nor obligations under those provisions in their relations with the author of the reservation.

3. To the extent that an established reservation modifies the legal effect of certain provisions of a treaty, the author of that reservation has rights and obligations under those provisions, as modified by the reservation, in its relations with the other parties with regard to which the reservation is established. Those other parties shall have rights and obligations under those provisions, as modified by the reservation, in their relations with the author of the reservation.

Commentary

(1) The three paragraphs of guideline 4.2.4 are structured as follows:

- The first paragraph sets out the principle contained in article 21, paragraph 1 (a), of the Vienna Convention, with the requisite adjustments for the purposes of the Guide to Practice;
- The second paragraph explains the consequences of this principle specifically when an established reservation excludes the legal effect of certain provisions of a treaty; and
- The third does the same when the reservation modifies this legal effect.

(2) In all three cases (and in the title of the guideline) the Commission has used the singular to designate the set of consequences attendant upon the establishment of a reservation, although in reality they are diverse, out of a concern to align the wording of the guideline with that of article 2, paragraph 1 (d), of the Vienna Conventions (reproduced in guideline 1.1), which employs the singular. That provision also establishes the distinction between reservations which purport to "exclude" and those which purport to "modify the legal effect of certain provisions of the treaty in their application" to the author of the reservation, whereas article 21, paragraph 1, states that an established reservation "modifies … the provisions of the treaty to which the reservation relates", without contemplating an

exclusionary effect. Reservations that modify should not, however, be treated as having precisely the same effect as reservations that exclude.

(3) In order to clarify further the content of the obligations and rights of the author of the reservation and of the State or international organization with regard to which the reservation is established, it is helpful to draw a distinction between, as Horn terms them, "modifying reservations" and "excluding reservations".[2105] The distinction is not always easy to make and it can happen that one and the same reservation has both an excluding and a modifying effect. Thus, a reservation by which its author purports to limit the scope of application of a treaty obligation only to a certain category of persons may be understood equally well as a modifying reservation (it modifies the legal effect of the initial obligation by limiting the circle of persons concerned) and as an excluding reservation (it purports to exclude the application of the treaty obligation for all persons not forming part of the specified category).[2106] It can also happen that an excluding reservation indirectly has modifying effects. In order to take account of such uncertainty, paragraphs 2 and 3 both begin with the phrase "To the extent that". The distinction does, however, permit a better insight into the two most common situations. The great majority of reservations may be classified in one or other of these categories, or at least understood by means of this distinction.

(4) Article 21, paragraph 1 (a), of the Vienna Conventions broadly determines the effect that the established reservation produces on the content of its author's treaty relations. In the 1986 Vienna Convention this provision reads:

> A reservation established with regard to another party in accordance with articles 19, 20 and 23:
>
> (a) Modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; …

(5) Apart from the lack of any reference to excluding reservations, although they are included in the definition of a reservation, another more serious inconsistency may be signalled between the definition of the term "reservation" in the Vienna Conventions and the effects contemplated in article 21, paragraph 1: whereas according to article 21 a reservation modifies "the provisions of the treaty", the purpose of a reservation according to article 2, paragraph 1 (d), is to modify or exclude "the legal effect of certain provisions of the treaty". This problem did not go unnoticed during the debate in the Commission: while some members stressed that the reservation could not change the provisions of the treaty and that it would be preferable to replace "provisions" by "application",[2107] other members paid little attention to the matter,[2108] or expressed their satisfaction with the text proposed by the Drafting Committee.[2109]

[2105] F. Horn, footnote 25 above, pp. 80–87.

[2106] See for example the Egyptian reservation to the Vienna Convention on Consular Reservations: "Article 49 concerning exemption from taxation shall apply only to consular officers, their spouses and minor children. This exemption cannot be extended to consular employees and to members of the service staff". (*Multilateral Treaties* ..., chap. III.6).

[2107] Rosenne (*Yearbook* ... *1965*, vol. I, 800th meeting, 11 June 1965, p. 172, para. 9, and 814th meeting, 29 June 1965, p. 291, para. 2) and Tsuruoka (*ibid.*, p. 272, para. 16).

[2108] Tunkin "considered it of no great importance whether the wording used was 'modifies the provisions of the treaty' or 'modifies the application of the provisions of the treaty'" (*ibid.*, para. 9). For a similar view, see Briggs (*ibid.*, para. 13).

[2109] See Briggs (*ibid.*, 800th meeting, 11 June 1965, p. 173, para. 28).

(6) In the literature, the question of whether it is the "provisions of the treaty" or their "legal effects" that are modified has been raised more forcefully. Imbert is of the view that:

> "*[C]'est précisément le lien établi par les rédacteurs de la Convention de Vienne entre la réserve et les dispositions d'une convention qui nous semble le plus critiquable. En effet, une réserve ne tend à éliminer une* disposition *mais une* obligation." [It is precisely the link which the drafters of the Vienna Convention established between reservations and the provisions of a convention that seems to be most open to criticism, in that a reservation is aimed at eliminating not a *provision* but an *obligation*.][2110]

However, this view considers the effect of the reservation only from the standpoint of its author, and appears to overlook the fact that in modifying the author's obligation the reservation also affects the correlative rights of the States or international organizations in respect of which the reservation is established. It is thus more convincing to conclude that, with regard to this question, article 2, paragraph 1 (d), of the 1969 and 1986 Conventions is better drafted than article 21, paragraph 1. It is unclear how a reservation, which is an instrument external to the treaty, could modify a provision of that treaty. It may exclude or modify its application, that is, its effect, but not the text itself, that is, the provisions.[2111]

(7) Moreover, the text of article 2, paragraph 1 (d), also does not appear to correspond fully to State practice with respect to reservations, in that it specifies that a reservation can purport to exclude or modify only "the legal effect of certain provisions of the treaty".[2112] It is in fact not uncommon for States to formulate reservations in order to modify the application of a treaty as a whole, or at least of a substantial part of it. In certain cases, such reservations can certainly not be regarded as permissible, in that they deprive the treaty of its object and purpose, so that they cannot be deemed "established reservations".[2113] However, that is not always the case, and there are in practice many examples of such across-the-board reservations which were not the subject of objections or challenges by the other contracting States.[2114] Article 21, paragraph 1, is more open in this respect, in that it simply provides that the reservation modifies [or excludes] "the provisions of the treaty to which the reservation relates to the extent of the reservation". If a reservation can thus permissibly purport to modify the legal effects of all of the provisions of a treaty with respect to certain specific aspects, as the Commission clearly acknowledged in the second paragraph of guideline 1.1 (Definition of reservations), it will have the effect, once established, of modifying the application of all those provisions, or indeed, as the case may be, of all of the provisions of the treaty, in accordance with article 21, paragraph 1.[2115]

[2110] P.-H. Imbert, footnote 25 above, p. 15 (emphasis in the original).

[2111] See paragraph (16) of the commentary to guideline 1.1.

[2112] P.-H. Imbert, footnote 20 above, pp. 14–15; R. Szafarz, footnote 27 above, p. 296. See, however, D. N. Hylton, who maintains that "[r]eservations modify a treaty only in regard to specific provisions" ("Default Breakdown: the Vienna Convention on the Law of Treaties: Inadequate Framework on Reservations", *Vanderbilt Journal of International Law*, vol. 27 (1994), No. 2, p. 422).

[2113] See guideline 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty) and commentary and paragraphs (19) and (20) of the commentary to guideline 1.1.

[2114] Paragraph (18) of the commentary to guideline 1.1.

[2115] "Mediante le riserve, gli Stati possono produrre l'effetto di restringere il campo d'applicazione materiale o soggetivo della convenzione, fino all'esclusione di una o più disposizioni dell'accordo o alla non applicazione per determinati soggetti, oppure manifestare la volontà di accettare le disposizioni con modalità restrittive o con limiti di ordine temporale o territoriale." [By means of reservations, States can reduce the material or subjective scope of application of a treaty to the point of exclusion of one or more provisions of the treaty or its non-application to

(8) It follows that a validly established reservation affects the treaty relations of the author of the reservation in that it excludes or modifies the legal effect of one or more provisions of the treaty, or even of the treaty as a whole, with respect to a specific aspect, and on a reciprocal basis.[2116]

(9) In accordance with the Commission's well-established practice in the context of the Guide to Practice, paragraph 1 of guideline 4.2.4 largely reproduces article 21, paragraph 1 (a), of the 1986 Vienna Convention while making the modifications justified by the above-mentioned arguments:

- The inclusion of "excluding" reservations;
- The point that the reservation does not modify "the provisions of the treaty" but their legal effect; and
- The point that it may have an effect not only on specific provisions but on the "treaty as a whole with respect to certain specific aspects".

(10) The two following paragraphs, which provide a more detailed description of, respectively, the modifying and excluding effects of established reservations are constructed along the same lines. In each the first sentence concerns the rights and obligations (or the lack thereof) of the author of the reservation. The second sentence deals with the rights and obligations of the other parties to the treaty with regard to which the reservation is established and in doing so it echoes the principle established in article 21, paragraph 1 (b), of the Vienna Conventions and sets out the principle of reciprocity in the application of the reservation.

(11) Paragraph 2 of guideline 4.2.4 explains the consequences of an established reservation when the latter excludes the legal effect of one or more provisions of the treaty.

(12) There are many examples of such reservations.[2117] Excluding reservations are often used, in particular to exclude compulsory dispute settlement procedures. Pakistan, for instance, notified the Secretary-General of the United Nations of the following reservation when it acceded on 17 June 2009 to the International Convention for the Suppression of the Financing of Terrorism:

> "The Government of the Islamic Republic of Pakistan does not consider itself bound by article 24, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism. The Government of the Islamic Republic of Pakistan hereby declares that, for a dispute to be referred to the International Court of Justice, the agreement of all parties shall in every case be required."[2118]

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specific subjects, or again they can demonstrate willingness to accept the provisions of the treaty in accordance with restrictive modalities or by attaching to the limitations of a temporal or territorial nature.] (P. de Cesari, "Riserve, dichiarazioni e facoltà delle convenzioni dell'Aja di diritto internazionale privato", in Tullio Treves (ed.), "Six Studies on Reservations", *Comunicazioni e Studi*, vol. 22 (2002), p. 167, para. 8).

[2116] On the matter of reciprocity, see below guideline 4.2.5 and commentary.

[2117] See also guideline 1.1.6 (Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of a treaty) and commentary.

[2118] See also the similar reservations of Algeria, Andorra, Bahrain, Bangladesh, China, Colombia, Cuba, Egypt, El Salvador, Saudi Arabia, the United Arab Emirates, the United States of America, etc. (*Multilateral Treaties* ..., chap. XVIII.11). See also the many reservations excluding the application of article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (*ibid.*, chap. IV.1).

(13) A considerable number of reservations also purport to exclude the application of substantive provisions of the treaty. Egypt, for example, formulated a reservation to the Vienna Convention on Diplomatic Relations purporting to exclude the legal effect of article 37, paragraph 2:

> "Paragraph 2 of article 37 shall not apply."[2119]

Cuba also made a reservation purporting to exclude the application of article 25, paragraph 1, of the Convention on Special Missions:

> "The Revolutionary Government of the Republic of Cuba enters an express reservation with regard to the third sentence of paragraph 1, article 25 of the Convention and consequently does not accept the assumption of consent to enter the premises of the special mission for any of the reasons mentioned in that paragraph or for any other reasons."[2120]

As another example, the Government of Rwanda formulated a reservation to the Convention on the Elimination of All Forms of Racial Discrimination worded as follows:

> "The Rwandese Republic does not consider itself as bound by article 22 of the Convention."[2121]

(14) Applying article 21, paragraph 1 (a), of the Vienna Conventions to reservations of this kind is relatively easy. An established reservation modifies the legal effect of the treaty provision to which the reservation relates "to the extent of the reservation", that is to say by simply excluding any legal effect of that treaty provision. Once the reservation is established, everything in the treaty relations between the author of the reservation and the parties with regard to which the reservation is established takes place as if the treaty did not include the provision referred to in the reservation. Excluding reservations thus have a "contraregulatory effect".[2122] The author of the reservation is no longer bound by the obligation stemming from the treaty provision in question, but is in no way prevented from complying with it (and being held to it if it should be the case that the treaty rule enunciates a customary obligation). It follows logically that the other States or international organizations with regard to which the reservation is established have waived their right to demand performance of the obligation stemming from the treaty provision in question in the context of their treaty relationship with the author of the reservation.

(15) Paragraph 2 of guideline 4.2.4 expresses this effect of excluding reservations in simple terms intended to leave no doubt that the author of the reservation is not bound by any obligation stemming from the treaty provision to which the excluding reservation relates and cannot claim any right stemming from it. And, as the word "likewise" in the second sentence indicates, the same is true conversely for the other parties with regard to which the reservation is established.

(16) It should be noted, moreover, that the exclusion by means of a reservation of an obligation stemming from a provision of the treaty does not automatically mean that the author of the reservation refuses to fulfil the obligation. The author of the reservation may simply wish to exclude the application of the treaty obligation within the legal framework

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[2119] *Ibid.*, chap. III.3. See also the reservation formulated by Morocco (*ibid.*).

[2120] *Ibid.*, chap. III.9.

[2121] *Ibid.*, chap. IV.2; see International Court of Justice, Judgment of 3 February 2006, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *I.C.J. Reports 2006*, p. 26, paras. 42–44.

[2122] F. Horn, footnote 25 above, p. 84.

established by the treaty. A State or an international organization may be in full agreement with a rule enunciated in a treaty provision, but nevertheless reject the competence of a treaty body or a judicial authority to rule on a dispute concerning the application and interpretation of that rule. While remaining entirely free to comply with the obligation established within the treaty framework, the author nevertheless excludes the applicability to itself of the control mechanisms established by the treaty.[2123]

(17) The concrete effect of a modifying reservation — the situation contemplated in paragraph 3 of guideline 4.2.4 — is significantly different and more difficult to grasp. Unlike the author of an excluding reservation, the author of a modifying reservation is not seeking to be released from its obligations stemming from one or more treaty provisions in order to regain freedom of action within the treaty's legal framework. Rather, it is seeking to replace the obligation stemming from the treaty provision with a different one.

(18) By such a modifying reservation the author, once the reservation is established, does not simply purport to be released from all treaty obligations stemming from the provisions to which the reservation relates. The effect of the reservation is to replace the obligation initially provided for in the treaty by another one which is provided for in the reservation. In other words, the obligation stemming from the treaty provision referred to in the reservation is replaced or modified by the one set forth in the reservation in the treaty relations between its author and the State or international organization with regard to which the reservation is established. Or, to be more precise, the established reservation leads to replacement of the obligation and the correlative right stemming from the treaty provision in question with the obligation and the correlative right provided for in the reservation or stemming from the treaty provision as modified by the reservation.

(19) However, the substitution of obligations has effect only with respect to the author of the reservation and has implications only for the other parties with regard to which the reservation is established. The phrase "as modified by the reservation", which is repeated twice in paragraph 3 and refers both to the rights and obligations of the author of the reservation and to those of the other parties with regard to which the reservation is established, is intended to draw attention to the diversity of these effects.

(20) An example of the first type of modifying reservation — those that modify only the rights and obligations of the author of the reservation *vis-à-vis* the other parties without affecting the content of the rights and obligations of the latter — is the reservation of the Federal Republic of Germany to the Convention on Psychotropic Substances:

> "In the Federal Republic of Germany, manufacturers, wholesale distributors, importers and exporters are not required to keep records of the type described [in paragraph 2 of article 11 of the Convention] but instead to mark specifically those items in their invoices which contain substances and preparations in Schedule III. Invoices and packaging slips showing such items are to be preserved by these persons for a minimum period of five years."[2124]

By means of this reservation, Germany thus purports not simply to exclude the application of article 11, paragraph 2, of the Convention on Psychotropic Substances, but rather to replace the obligation stemming from that provision with another, different one that applies only to the author of the reservation.

[2123] See also guideline 3.1.5.3 (Reservations to a provision reflecting a customary rule) and commentary, in particular paragraph (7) of the commentary.

[2124] *Multilateral Treaties* ..., chap. VI.6.

(21) The Finnish reservation to article 18 of the Convention on Road Signs and Signals of 1968 is another example that clearly shows that the author of the reservation is not simply releasing itself from its obligation under the treaty, but is replacing it, at least in part, with another obligation that in no way modifies the rights and obligations of the other parties:

> "Finland reserves the right not to use signs E,9a or E,9b to indicate the beginning of a built-up area, nor signs E,9c or E,9d to indicate the end of such an area. Instead of them symbols are used. A sign corresponding to sign E,9b is used to indicate the name of a place, but it does not signify the same as sign E,9b."[2125]

(22) On the other hand, the reservation that Israel formulated to the first, second and fourth Geneva Conventions in relation to the articles on a distinctive sign for medical personnel,[2126] while it does not appear to modify directly the content of the relevant provisions, except with respect to Israel itself, does impose corresponding obligations on the other parties with regard to which it is established. The reservation to the first Geneva Convention reads as follows:

> "Subject to the reservation that, while respecting the inviolability of the distinctive signs and emblems of the Convention, Israel will use the Red Shield of David as the emblem and distinctive sign of the medical services of her armed forces."[2127]

Israel thereby imposes on the other parties with regard to which its reservation is established the obligation, not originally provided for, to respect a new emblem in their relations with Israel.

(23) Similarly, the reservations of the Union of Soviet Socialist Republics to article 9 of the Convention on the High Seas[2128] concluded in Geneva in 1958 and to article 20 of the Convention on the Territorial Sea and the Contiguous Zone[2129] are clearly intended to establish a treaty regime that would impose on other parties to those conventions obligations which they did not undertake when ratifying or acceding to them. The same could be said about the reservations of Denmark, Ireland, Spain, Sweden and the United Kingdom to the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations,[2130] since they modify, *ratione personae*, the treaty regime by calling for the shifting of the obligation from one entity to another.

[2125] *Ibid.*, chap. XI.B.20.

[2126] This reservation was formulated following the rejection of an amendment proposed by Israel at the 1949 Diplomatic Conference to include the Red Shield of David among the distinctive signs for medical personnel. Israel thereupon formulated three similar reservations upon signing the Geneva Conventions (on 8 December 1949), which it confirmed upon ratification (6 July 1951).

[2127] Available from http://www.eda.admin.ch/eda/fr/home/topics/intla/ intrea/chdep/warvic.html.

[2128] "The Government of the Union of Soviet Socialist Republics considers that the principle of international law according to which a ship on the high seas is not subject to any jurisdiction except that of the flag State applies without restriction to all government ships" (*Multilateral Treaties ...*, chap. XXI.2).

[2129] "The Government of the Union of Soviet Socialist Republics considers that government ships in foreign territorial waters have immunity and that the measures mentioned in this article may therefore be applied to them only with the consent of the flag State" (*ibid.*, chap. XXI.1).

[2130] These reservations all seek to preserve the delegation of certain areas of responsibility to the European Union. They are drafted in nearly identical terms, despite some slight variations in wording. The reservation of Ireland, for example, reads: "Whereas to the extent to which certain provisions of the Tampere Convention on the Provision of Telecommunications Resources for Disaster Mitigation and Relief Operations ('the Convention') fall within the responsibility of the European Community, the full implementation of the Convention by Ireland has to be done in accordance with the procedures of this international organisation" (*ibid.*, chap. XXV.4).

(24) While it is not mechanical, excluding reservations lend themselves better to reciprocity than do modifying reservations (especially those in the first category, which modify only the content of the rights and obligations of their author). The Commission has nevertheless thought it necessary to refer, in the second sentence of both paragraphs 2 and 3 of guideline 4.2.4, to the general principle of reciprocal application of reservations set out in article 21, paragraph 1 (b), of the Vienna Conventions. These references should be understood as being without prejudice to the exceptions in guideline 4.2.5.

(25) The principle of reciprocal application of reservations means that as soon as a reservation has been established, it can be invoked not only by its author but also by any other party with regard to which it has acquired this status, as shown by the second sentence in paragraphs 2 and 3 of guideline 4.2.4. The reservation creates between its author and the parties with regard to which it is established a special regulatory system which is applied on a reciprocal basis. In this regard, Waldock has explained that "reservations always work both ways".[2131] This idea is also to be found in article 21, paragraph 1 (b), of the Vienna Conventions, which, in its 1986 version, reads as follows:

> "1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
>
> (a) ...
>
> (b) modifies those provisions [of the treaty to which they relate] to the same extent for that other party in its relations with the reserving State or international organization."

(26) It follows that the author of the reservation is not only released from compliance with the treaty obligations which are the subject of the reservation but also loses the right to require the State or international organization with regard to which the reservation is established to fulfil the treaty obligations that are the subject of the reservation. In addition, the State or the international organization with regard to which the reservation is established is released from compliance with the obligation which is the subject of the reservation with respect to the reserving State or organization.

(27) This principle of reciprocal application is based on common sense.[2132] The system of rules governing treaty relations between the two States concerned reflects the common denominator of their respective commitments resulting from the overlap — albeit partial — of their wills.[2133] It follows "directly from the consensual basis of treaty regulations",[2134] which

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[2131] "General Course on Public International Law", *Recueil des cours de l'Académie du droit international de la Haye* (RCADI), vol. 106 (1962-II), p. 87.

[2132] Dionisio Anzilotti believed that "*l'effetto della riserva è che lo Stato riservante non è vincolato dalle disposizioni riservate: naturalmente, le altre parti non sono vincolate verso di lui, di guisa che, nei rapporti tra lo Stato riservante e gli altri, le disposizioni riservate sono come se non facessero parte del trattato*" [the effect of the reservation is that the reserving State is not bound by the provisions which are the subject of the reservation; naturally, the other parties are not bound in respect [illegible] it; thus, in relations between the reserving State and the others, it is as if the provisions which are the subject of the reservation are not part of the treaty.] (*Corso di diritto internazionale*, vol. 1 (*Introduzione-Teorie generali*), (Padova, CEDAM, 1955), p. 355).

[2133] R. Baratta, footnote 701 above, p. 291: "*Si è poi visto che l'orientamento che emerge della pratica internazionale appare in sintonia con il principio consensualistico posto a fondamento del diritto dei trattati: la norma riservata è priva di giuridicità non essendosi formato l'accordo fra tali soggetti a causa dell'apposizione della riserva stessa.*" [We have seen, moreover, that the trend resulting from international practice seems to be linked with the consensual principle, a basic element of treaty law: the rule which is the subject of the reservation loses its juridical has a significant influence on the general regime of reservations of the Vienna Convention, as Waldock explains in his first report on treaty law:

> "A reservation operates reciprocally between the reserving State and any other party to the treaty, so that both are exempted from the reserved provisions in their mutual relations."[2135]

(28) The International Court of Justice presented the problem of the reciprocal application of the optional declarations of acceptance of compulsory jurisdiction provided for in article 36, paragraph 2, of the Statute of the Court in a comparable, although slightly different, way. In its judgment in the *Norwegian Loans* case, it stated that:

> "since two unilateral declarations are involved, such jurisdiction is conferred upon the Court only to the extent to which the two Declarations coincide in conferring it. A comparison between the two Declarations shows that the French Declaration accepts the Court's jurisdiction within narrower limits than the Norwegian Declaration; consequently, the common will of the Parties, which is the basis of the Court's jurisdictions, exists within these narrower limits indicated by the French reservation".[2136]

(29) The reciprocity of the effects of the reservation also rebalances the inequalities created by the reservation in the bilateral relations between the author of the reservation and the other States or international organizations with regard to which the reservation is established. These latter cannot, through the reservations mechanism, be bound by more obligations towards the author of the reservation than the latter itself is ready to assume.[2137] Simma believed in this regard that:

> "*Wer sich bestimmten Vertragsverpflichtungen durch einen Vorbehalt entzogen hat, kann selbst auch nicht verlangen, im Einklang mit den vom Vorbehalt erfassten Vertragsbestimmungen behandelt zu werden* [Whoever has withdrawn from certain treaty obligations by a reservation cannot claim treatment in accordance with the treaty provisions which are the subject of the reservation]."[2138]

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status, absent an agreement between subjects of law due to the fact of the formulation of the reservation itself.]

[2134] Sir Humphrey Waldock, first report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 68, para. 21. The Commission endorsed this explanation in the commentary to draft article 19 (which became article 21 of the 1969 Vienna Convention) adopted on second reading (*Yearbook ... 1966*, vol. II, p. 209, para. (1) of the commentary).

[2135] Sir Humphrey Waldock, first report on the law of treaties, A/CN.4/144, *Yearbook ... 1962*, vol. II, p. 68, para. 21.

[2136] Judgment of 6 July 1957, *Case of Certain Norwegian Loans* (*France v. Norway*), *I.C.J. Reports, 1957*, p. 23.

[2137] See *Yearbook ... 1966*, vol. II, p. 206, para. (13) of the commentary to draft articles 16 and 17. Roberto Baratta has rightly maintained that the reciprocity of the effects of a reservation has proven to be a "*strumento di compensazione nelle mutue relazioni pattizie tra parti contraenti; strumento che è servito a ristabilire la parità nel* quantum *degli obblighi convenzionali vicendevolmente assunti, parità unilateralmente alterata da una certa riserva*" [compensatory mechanism in the mutual relations between contracting parties which has served to restore the balance in the *quantum* of reciprocally assumed treaty obligations that was unilaterally altered by a given reservation]; footnote 701 above, p. 292.

[2138] *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge* (Berlin, Duncker & Humblot, 1972), p. 60.

(30) The reciprocal application of a reservation follows directly from the idea of the reciprocity of international commitments and of give-and-take between the parties and conforms to the maxim *do ut des*.

(31) Furthermore, the reciprocity of the effects of the reservation plays a non-negligible regulatory, even deterrent, role in the exercise of the widely recognized right to formulate a reservation: the author of the reservation must bear in mind that the effects of the reservation are not only to its own benefit; the author also runs the risk of the reservation being invoked against it. On this subject, Waldock has written:

> "There is of course another check upon undue exercise of the freedom to make reservations in the fundamental rule that a reservation always works both ways, so that any other State may invoke it against the reserving State in their mutual relations."[2139]

(32) Reciprocal application thus cuts both ways and "contributes significantly to resolving the inherent tension between treaty flexibility and integrity".[2140] In a way, this principle appears to be a complement to, and is often far more of a deterrent than, the requirement of permissibility of the reservation, owing to the uncertain determination of permissibility in a good number of cases.

(33) A number of reservation clauses thus make express reference to the principle of reciprocal application of reservations,[2141] whereas other treaties recall the principle of reciprocal application in more general terms.[2142] However, such express clauses are superfluous.[2143] The principle of reciprocity is recognized not only as a general principle,[2144] but also as a principle that applies automatically, requiring neither a specific clause in the

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[2139] Footnote 2131 above, p. 87. See also Francesco Parisi, Catherine Ševcenko, "Treaty Reservations and the Economics of Article 21 (1) of the Vienna Convention", *Berkeley Journal of International Law*, vol. 21 (2003), pp. 1–26.

[2140] F. Parisi, C. Ševcenko, *ibid.*, p. 16. See also R. Baratta, footnote 701 above, pp. 295–296.

[2141] This was already the case in article 20, paragraph 2, of The Hague Convention on Conflict of Nationality Laws of 1930 ("The provisions thus excluded cannot be applied against the Contracting Party who has made the reservation nor relied on by that Party against any other Contracting Party"). Other examples are found in The Hague Conventions on International Private Law (for these reservation clauses, see Ferenc Majoros, *Clunet (JDI)*, 1974, p. 90 *et seq.*), in a number of conventions concluded within the United Nations Economic Commission for Europe (see P.-H. Imbert, footnote 25 above, pp. 188–191 and p. 251) and in some conventions drawn up and concluded within the Council of Europe. For example, the Model Final Clauses for Conventions and Agreements Concluded within the Council of Europe adopted by the Council of Ministers in 1980 proposes the following provision relating to reciprocity of the effects of reservation: "A Party which has made a reservation in respect of a provision of [the Agreement concerned] may not claim the application of that provision by any other Party; it may, however, if its reservation is partial or conditional, claim the application of that provision insofar as it has itself accepted it" (art. e, para. 3). See also F. Horn, footnote 25 above, pp. 146 and 147.

[2142] See, for example, article 18 of the Convention on the Recovery Abroad of Maintenance ("A Contracting Party shall not be entitled to avail itself of this Convention against other Contracting Parties except to the extent that it is itself bound by the Convention") or article XIV of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound by the Convention").

[2143] P.-H. Imbert, footnote 25 above, p. 252; F. Majoros, footnote 2141 above, pp. 83 and 109. Majoros criticizes the introduction of clauses reiterating the reciprocity principle into treaties "for reasons of clarity and legal stability" (*ibid.*, p. 81).

[2144] See F. Majoros, footnote 2141 above, pp. 83 and 109; R. Baratta, footnote 701 above, p. 243 *et seq.*; F. Horn, footnote 25 above, p. 148; see also B. Simma, footnote 2138 above, pp. 60–61.

treaty nor a unilateral declaration by the States or international organizations that have accepted the reservation to that effect.[2145]

(34) Draft article 21 adopted on first reading by the Commission in 1962 was, however, not very clear as regards the question of the automatic nature of the reciprocity principle, in that it provided that the reservation would operate "reciprocally to entitle any other State Party to the treaty to claim the same modification of the provisions of the treaty in its relations with the reserving State".[2146] This formulation of the rule implied that the other contracting States must invoke the reservation in order to benefit from the effects of reciprocity. Following the comments of Japan and the United States,[2147] the text was recast so as to establish that the reservation produces *ipso jure* the same effect for the reserving State and the State accepting it.[2148] Although it still underwent a number of drafting changes,[2149] the text finally adopted by the Commission in 1965 thus clearly expresses the idea of automaticity.

4.2.5 Non-reciprocal application of obligations to which a reservation relates

Insofar as the obligations under the provisions to which the reservation relates are not subject to reciprocal application in view of the nature of the obligations or the object and purpose of the treaty, the content of the obligations of the parties other than the author of the reservation remains unaffected. The content of the obligations of those parties likewise remains unaffected when reciprocal application is not possible because of the content of the reservation.

Commentary

(1) As its title indicates, guideline 4.2.5 deals with exceptions to the general principle of reciprocal application of a reservation as between its author and the other parties to the treaty with regard to which the reservation is established.

(2) Although the second sentences of paragraphs 2 and 3 of guideline 4.2.4 reflect the principle of reciprocal application of reservations, each in its own way, taking up the idea embodied in article 21, paragraph 1 (b), of the Vienna Conventions, guideline 4.2.5 emphasizes that this principle is not absolute.[2150] It cannot, in particular, find application in cases where a rebalancing between the obligations of the author of the reservation and the

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[2145] R. Baratta, footnote 701 above, pp. 227 *et seq.* and 291; F. Majoros, footnote 2141 above, pp. 83 and 109; F. Parisi and C. Ševcenko, footnote 2139 above, p. 20. There have, however, been cases where, simply as a precaution, States have made their acceptance conditional upon the reciprocal application of the reservation. It is in this sense that we must understand the United States declarations in response to the reservation by Romania and the USSR to the Convention on Road Traffic of 1949, whereby the Government of the United States specified that it "has no objection to [these] reservation[s] but considers that it may and hereby states that it will apply [these] reservation[s] reciprocally with respect to [their respective author States]". *Multilateral Treaties* ..., chap. XI.B.1.

[2146] *Yearbook ... 1962*, vol. II, p. 181.

[2147] *Yearbook ... 1966*, vol. II, pp. 303 and 351. See also the comments by Austria (*ibid.*, p. 282).

[2148] See Sir Humphrey Waldock, fourth report on the law of treaties (A/CN.4/177 and Add.1 and 2), *Yearbook ... 1965*, vol. II, p. 58.

[2149] For the final text of draft article 19, see *Yearbook ... 1966*, vol. II, p. 227.

[2150] B. Simma, footnote 2138 above, p. 61; R. Baratta, footnote 701 above, p. 292; D.W. Greig, footnote 28 above, p. 139; F. Horn, footnote 25 above, p. 148 ff.; Roger Pinto, "L'application du principe de réciprocité et des réserves dans les conventions interétatiques concernant les droits de l'Homme", in: *Mélanges offerts à Georges Levasseur. Droit pénal. Droit européen* (Litec, 1992), pp. 83–88; or A. Pellet and D. Müller, footnote 1623 above, pp. 533–535.

State or international organization with regard to which the reservation is established is unnecessary or proves impossible. This is the case essentially because of the nature of the obligation to which the reservation relates, the object and purpose of the treaty or the content of the reservation itself.

(3) The first sentence of guideline 4.2.5 covers the first of these hypotheses: the case in which the reciprocal application of the reservation is excluded because of the nature of the obligation to which the reservation relates or the object and purpose of the treaty – these two subcategories being difficult to distinguish. If the treaty itself is not based on reciprocity of rights and obligations between the parties, a reservation can produce no such reciprocal effect.

(4) A typical example is afforded by human rights treaties.[2151] The fact that a State formulates a reservation excluding the application of one of the obligations contained in such a treaty does not release a State which accepts the reservation from respecting that obligation, despite the existence of the reservation, to the extent that the obligation concerned is not reciprocal, in other words, to the extent that such obligations apply not in an inter-State relationship between the reserving State and the State which has accepted the reservation, but rather in a State-person relationship. The Human Rights Committee considered in this respect in its general comment No. 24 that:

> "Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction."[2152]

For this reason, the Committee continues, the human rights treaties, "and the Covenant [on Civil and Political Rights] specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place."[2153]

(5) Moderating this formulation, which appears too absolute, the phrase "insofar as" with which guideline 4.2.5 begins aims to show that, even if the nature of the obligation or the object and purpose of the treaty as a whole exclude the reciprocity of reservations, elements of reciprocity may nevertheless remain in the relations between the author of the reservation and the other parties to the treaty. Thus, for example, it is clear that a State or international organization that has made a reservation cannot invoke the obligation excluded or modified by that reservation and require the other parties to fulfil it – even though the other parties remain bound by the obligation in question. This also means that guideline 4.2.5 is without effect on the normal operation of the reservation in the relations among the other parties (whose obligations it does not modify);[2154] this is the meaning of the phrase "the content of the obligations of the parties other than the author of the reservation remains unaffected" at the end of the first sentence of guideline 4.2.5.

(6) Moreover, human rights treaties are not the only treaties that do not lend themselves to reciprocity. The effect of reciprocity is also absent from treaties establishing obligations owed

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[2151] See the first report on the law and practice relating to reservations to treaties (A/CN.4/470), *Yearbook ... 1995*, vol. II, Part One, p. 148, para. 138. See also the second report on reservations to treaties (A/CN.4/477/Add.1), *Yearbook ... 1996*, vol. II (Part One), p. 65, paras. 148 to 154.

[2152] CCPR/C/21/Rev.1/Add.6, 11 November 1994, para. 8. See also M. Coccia, footnote 195 above, p. 37; P.-H. Imbert, footnote 25 above, p. 153; or Michel Virally, "Le principe de réciprocité dans le droit international contemporain", *RCADI*, vol. 122 (1967-III), pp. 26 and 27.

[2153] CCPR/C/21/Rev.1/Add.6, para. 17.

[2154] See guideline 4.6.

to the community of contracting States. Examples can be found in treaties on commodities,[2155] in environmental protection treaties, in some demilitarization or disarmament treaties[2156] and also in international private law treaties providing for uniform law.[2157]

(7) In all these situations, a reservation cannot produce a reciprocal effect in the bilateral relations between its author and a State or international organization with regard to which the reservation is established. A party owes it to all the other parties to the treaty to respect the obligation. Thus the reverse effect of the reservation has "nothing on which it can 'bite' or operate".[2158]

(8) As Roberto Baratta has pointed out:

> "*[A]nche in ipotesi di riserve a norme poste dai menzionati accordi l'effetto di reciprocità si produce, in quanto né la prassi, né i princìpi applicabili in materia inducono a pensare che lo State riservante abbia un titolo giuridico per pretendere l'applicazione della dispositione da esso riservata rispetto al soggetto non autore della riserva. Resta nondimeno, in capo a tutti i soggetti che non abbiano apposto la stessa riserva, l'obbligo di applicare in ogni caso la norma riservata a causa del regime solidaristico creato dall'accordo.*"[2159] [Even on the assumption of reservations to the rules enunciated in the above-mentioned agreements, the effect of reciprocity is produced, as neither practice nor the principles applicable suggest that the reserving State would have a legal right to call for the application of the provision to which the reservation relates by a subject which is not the author of the reservation. There nonetheless remains the obligation for all subjects which have not formulated the reservation to apply in all cases the rule to which the reservation relates, by virtue of the regime of solidarity established by the agreement.]

(9) This, moreover, was the thinking underlying the model clause on reciprocity adopted by the Council of Ministers of the Council of Europe in 1980:

> "A Party which has made a reservation in respect of a provision of [the Agreement concerned] may not claim the application of that provision by any other Party; it may, however, if its reservation is partial or conditional, claim the application of that provision insofar as it has itself accepted it."[2160]

(10) The second sentence of guideline 4.2.5 concerns the second exception to the general principle of the reciprocal application of reservations: a situation when "reciprocal application is not possible because of the content of the reservation".

[2155] H.G. Schermers, "The Suitability of Reservations to Multilateral Treaties", *Nederlands Tijdschrift voor Internationaal Recht*, vol. VI (1959), No. 4, p. 356. See also D.W. Greig, footnote 28 above, p. 140.

[2156] F. Horn, footnote 25 above, pp. 164–165.

[2157] On the conventions of The Hague Conference on International Private Law, see Patrizia de Cesari, footnote 2115 above, pp. 149–174, and F. Majoros, footnote 2141 above, pp. 73–109.

[2158] G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol. I (Cambridge, Grotius Publications, 1986), p. 412.

[2159] R. Baratta, footnote 701, p. 294; D.W. Greig, footnote 28, p. 140.

[2160] Committee of Ministers of the Council of Europe, 315th meeting, 1980, *Model Final Clauses for Conventions and Agreements concluded within the Council of Europe*, article e (3), available from http://conventions.coe.int/Treaty/EN/Treaties/Html/ClausesFinales.htm. On this subject, see F. Majoros, footnote 2141 above, p. 90, and F. Horn, footnote 25 above, pp. 146–147.

(11) This situation arises, for example, in the case of reservations purporting to limit the territorial application of a treaty. Reciprocal application of such a reservation is quite simply not possible in practice.[2161] Similarly, reciprocal application of the effects of the reservation is also excluded if it was motivated by situations obtaining specifically in the reserving State.[2162] Thus, the reservation formulated by Canada to the Convention on Psychotropic Substances of 1971 purporting to exclude peyote[2163] from the application of the Convention, formulated solely because of the presence in Canadian territory of groups which use in their magical or religious rites certain psychotropic substances that would normally fall under the Convention regime,[2164] could not be invoked in its own favour by another party to the Convention unless if it was confronted with the same situation.

(12) The principle of reciprocal application of reservations may also be limited by reservation clauses contained in the treaty itself. An example is the Convention concerning Customs Facilities for Touring and its Additional Protocol of 1954. Article 20, paragraph 7, of the Convention provides:

> "No Contracting State shall be required to extend to a State making a reservation the benefit of the provisions to which such reservation applies. Any State availing itself of this right shall notify the Secretary-General accordingly and the latter shall communicate its decision to all signatory and contracting States.[2165]

Even though this particular clause does not in itself exclude the application of the principle of reciprocity, it deprives it of automaticity by making it subject to notification by the accepting State. Such notifications have been made by the United States of America in relation to the reservations formulated by Bulgaria, Romania and the Union of Soviet Socialist Republics to the dispute settlement mechanism provided for in article 21 of that Convention.[2166]

4.2.6 Interpretation of reservations

A reservation is to be interpreted in good faith, taking into account the intention of its author as reflected primarily in the text of the reservation, as well as the object and purpose of the treaty and the circumstances in which the reservation was formulated.

Commentary

(1) It is often difficult to specify to what extent treaty relations are modified by the establishment of a reservation[2167] or to what extent the effect of the principle of reciprocal application is excluded or limited,[2168] or even to determine whether a unilateral declaration presented as a reservation meets the definition of a reservation.

(2) Since reservations are unilateral acts, the Commission based itself on the guidelines for interpreting such acts contained in the Guiding Principles applicable to unilateral declarations

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[2161] P.-H. Imbert, footnote 25 above, p. 258; B. Simma, footnote 2138 above, p. 61.

[2162] F. Horn, footnote 25 above, pp. 165 and 166; P.-H. Imbert, footnote 25 above, pp. 258–260. See however the more cautious ideas relating to such situations formulated by Ferenc Majoros, footnote 2141 above, pp. 83 and 84.

[2163] Peyote is a species of small cactus which has hallucinogenic psychotropic effects.

[2164] *Multilateral Treaties* ..., chap. VI.16.

[2165] *Ibid.*, chap. XI.A.6.

[2166] *Ibid.*, chap. XI.A.6 and A.7. See R. Riquelme Cortado, footnote 150 above, p. 212 (note 44).

[2167] See guideline 4.2.4 (Effect of an established reservation on treaty relations) and commentary.

[2168] See guideline 4.2.5 (Non-reciprocal application of obligations to which a reservation relates), in particular paragraph (11) of the commentary.

of States capable of creating legal obligations, which it adopted in 2006.[2169] It should not be forgotten, however, that reservations are acts attached to a treaty, the legal effect of which they purport to modify or exclude. Consequently, the treaty is the context that should be taken into account for the purposes of interpreting the reservation. Guideline 4.2.6 combines these two ideas.

(3) With regard to unilateral acts, the warning by the International Court of Justice against mechanical transposition of the rules for the interpretation of treaties to unilateral acts should be borne in mind:

> "The Court observes that the provisions of that Convention may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction."[2170]

(4) It was in this spirit that the Commission elaborated principle No. 7 of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations:

> "7. A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated."[2171]

(5) This general approach is also found, *mutatis mutandis*, in guideline 4.2.6, which, in line with the case law of the International Court of Justice, places emphasis on the intention of the author as one of the main elements on which interpretation of the reservation should be based:

> "48. At the same time, since a declaration under Article 36, paragraph 2, of the Statute is a unilaterally drafted instrument, the Court has not hesitated to place a certain emphasis on the intention of the depositing State. Indeed, in the case concerning *Anglo-Iranian Oil Co.*, the Court found that the limiting words chosen in Iran's declaration were 'a decisive confirmation of the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court'. ([*Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I. C. J. Reports 1952*], p. 107.)
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> "49. The Court will thus interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. The intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served."[2172]

[2169] Commission, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, in Report of the Commission on the work of its fifty-eighth session, 2006 (*Official Documents of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/61/10)), pp. 366–381.

[2170] Judgment of 4 December 1998, *Fisheries jurisdiction (Spain v. Canada), Jurisdiction of the Court, I.C.J Reports 1952*, p. 453, para. 46.

[2171] *Guiding Principles applicable to unilateral declarations of States* ..., footnote 2169 above, p. 368 and *ibid.* pp. 377–378.

[2172] Judgment of 4 December 1998, *Fisheries jurisdiction (Spain v. Canada), Jurisdiction of the Court, I.C.J Reports 1952*, footnote 2170 above, p. 454, paras. 48 and 49.

(6) It is very clear from these paragraphs that the interpretation of a unilateral act aims to establish the intention of the author of the act. The text of the reservation is the primary indicator of intention.[2173] This approach is especially relevant in the case of reservations, since they are defined by the objective their author *purports* to attain.[2174]

(7) The intention of the reserving State or international organization can be derived in the first instance from the actual text of the reservation. The predominance of the text is confirmed in case law. Thus in the case of *Boyce et al. v. Barbados*, the Inter-American Court of Human Rights was called upon to give its view on the effects of the reservation to the American Convention on Human Rights made by the defending State.[2175] The reservation reads as follows:

> "In respect of 4(4) the criminal code of Barbados provides for death by hanging as a penalty for murder and treason. The Government is at present reviewing the whole matter of the death penalty which is only rarely inflicted but wishes to enter a reservation on this point inasmuch as treason in certain circumstances might be regarded as a political offence and falling within the terms of section 4(4).
>
> "In respect of 4(5) while the youth or old age of an offender may be matters which the Privy Council, the highest Court of Appeal, might take into account in considering whether the sentence of death should be carried out, persons of 16 years and over or over 70 years of age may be executed under Barbadian law."[2176]

(8) Barbados maintained, *inter alia*, that its reservation to the Convention prevented the Court from ruling on issues of capital punishment, or on how such punishment was implemented. Invoking its advisory opinions of 1982 and 1983,[2177] the Court recalled:

> "Firstly, in interpreting reservations the Court must first and foremost rely on a strictly textual analysis."[2178]

Having examined the reservation by Barbados in this light, the Court arrived at the conclusion that

> "the text of the reservation does not explicitly state whether a sentence of death is mandatory for the crime of murder, nor does it address whether other possible methods of execution or sentences are available under Barbadian law for such a crime. Accordingly, the Court finds that a textual interpretation of the reservation entered by Barbados at the time of ratification of the American Convention clearly indicates that this reservation was not intended to exclude from the jurisdiction of this Court neither the mandatory nature of the death penalty nor the particular form of execution by hanging. Thus the State may not avail itself of this reservation to that effect".[2179]

[2173] See principle No. 7 of the Guiding Principles, footnote 2169 above, para. 4.

[2174] See guideline 1.1.

[2175] Judgment of 20 November 2007, *Series C, No. 169*, paras. 13–17.

[2176] United Nations, *Treaty Series*, vol. 1298, p. 441 (No. A–17955).

[2177] Advisory Opinion OC-2/82, 24 September 1982, *Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Series A, No. 2*, para. 35; Advisory Opinion OC-3/83, 8 September 1983, *Restrictions to the Death Penalty (Arts. 4(2) and 4(4)) American Convention on Human Rights, Series A, No. 3*, paras. 60–66.

[2178] Judgment previously cited, footnote 2175, para. 15 (footnotes omitted).

[2179] *Ibid.*, para. 17.

The Court also pointed out that it "has previously considered that 'a State reserves no more than what is contained in the text of the reservation itself'."[2180]

(9) Other elements should be taken into consideration for the purposes of determining the intention of the author of the reservation, including in particular the texts accompanying the formulation of the reservation, especially those explaining the reasons for the reservation,[2181] and possibly circumstances of its formulation (or, in the words of the International Court of Justice, "circumstances of its preparation")[2182] that may clarify the meaning of the reservation. Thus, in the case concerning the *Aegean Sea Continental Shelf (Greece v. Turkey)*, the Court based itself on:

- "the explanation of reservation *(b)* given in the *exposé des motifs*",[2183]
- "a document referred to by [the Greek] counsel as 'the *travaux préparatoires* of the reservation'"[2184] (actually a letter explaining the circumstances of the formulation of the Greek reservation),[2185]
- and "certain internal documents relating to the preparation of Greece's instrument of accession to the General Act".[2186]
- In the same spirit, the Court took into account "the general historical context in which reservations of questions relating to territorial status had come into use in the League of Nations period",[2187] which corresponds to the circumstances, in the broad sense of the term, in which the reservation was made.

All these exogenous elements were considered together by the Court in determining "the intention of the Greek Government at the time when it deposited its instrument of accession to the General Act".[2188]

(10) As indicated in guideline 4.2.6, the exogenous elements to consider in the interpretation of the reservation should include the object and purpose of the treaty, since the reservation is a non-autonomous unilateral act, which only produces an effect within the framework of the treaty. It is also important to recall that this is one of the criteria for the permissibility of the reservation: it is because a reservation has passed the test of permissibility that it is "established", and thus capable of producing the effects intended by its author. The reservation can only produce these effects precisely to the extent that it is compatible with the object and purpose of the treaty.

(11) The question is particularly significant in the case of reservations the compatibility of which with the object and purpose of the treaty is questionable and may depend on the precise meaning attributed to the reservation. If the permissibility of the reservation is to be preserved, and thereby the intention of the author, whose good faith must be presumed, it can only be

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[2180] *Ibid.* See also Advisory Opinion OC-3/83, footnote 2177 above, para. 69.

[2181] See guideline 2.1.2 (Statement of reasons for reservations) and commentary, in particular paragraphs (4) and (5).

[2182] See paragraph 49 *in fine* of the judgment in *Fisheries jurisdiction (Spain v. Canada), Jurisdiction of the Court*, referred to in paragraph (3) of the commentary, footnote 2170 above.

[2183] *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment of 19 December 1978, *I.C.J. Reports* 1978, p. 28, para. 68.

[2184] *Ibid.*, p. 26, para. 63.

[2185] *Ibid.*, pp. 26–27, paras. 63–64.

[2186] *Ibid.*, p. 27, para. 65.

[2187] *Ibid.*, p. 29, para. 70.

[2188] *Ibid.*, p. 29 para. 69.

preserved at the cost of heightened attention to the preservation of the object and purpose of the treaty. This interdependence was highlighted by the Court in its advisory opinion of 1951:

> "The disadvantages which result from this possible divergence of views [as to the validity of the reservation] ... are real; they are mitigated by the common duty of the contracting States to be guided in their judgment by the compatibility or incompatibility of the reservation with the object and purpose of the Convention. It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and in its application."[2189]

(12) The criterion of the object and purpose of the treaty is the parameter for assessing the permissibility of the reservations, whether by a body established by the treaty itself, a dispute settlement body, or other States or contracting organizations.

(13) However, this does not mean that, as a general rule, reservations should be interpreted restrictively.[2190] The International Court of Justice has not generally referred to a restrictive interpretation in its interpretation of reservations.[2191]

(14) The position of human rights treaty monitoring bodies is, however, the opposite. Thus, the Inter-American Court of Human Rights, in the case of *Boyce et al. v. Barbados* referred to above, held that the realization of the object and purpose of the treaty required the Court to consider in a restrictive manner any limitation on those rights:

> "Secondly, due consideration must also be assigned to the object and purpose of the relevant treaty which, in the case of the American Convention, involves the 'protection of the basic rights of individual human beings'. In addition, the reservation must be interpreted in accordance with Article 29 of the Convention, which implies that a reservation may not be interpreted so as to limit the enjoyment and exercise of the rights and liberties recognized in the Convention to a greater extent than is provided for in the reservation itself."[2192]

The question therefore arises of whether, by their nature, human rights treaties require the application of specific principles of interpretation. It goes without saying that the answer to this question far exceeds the scope of the present Guide to Practice.

(15) One last indication demonstrates the substantive interdependence between the reservation and the treaty to which it relates: the International Court of Justice has, on occasion, applied the principle of dynamic interpretation to the terms of the reservation, on the same grounds as to the terms of the treaty itself. It follows that if the meaning of the latter evolves over time, that evolution also affects the identical terms appearing in the reservation,

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[2189] *I.C.J. Reports 1951*, footnote 604 above, pp. 26–27.

[2190] International Court of Justice, *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court*, footnote 2170 above, p. 453, para. 45.

[2191] The Court explicitly rejected the principle of restrictive interpretation of reservations accompanying optional declarations to article 36 of the Statute: "There is no reason to interpret them restrictively." (International Court of Justice, *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court*, footnote 2170 above, p. 453, para. 44; see also *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, footnote 2183 above, p. 31, para. 74.

[2192] Judgement cited above in footnote 2175, para. 15 (footnotes omitted). See also Inter-American Court of Human Rights, Judgement, 1 September 2001, *Benjamin et al. v. Trinidad and Tobago, Preliminary Objections, Series C, No. 81*, para. 70.

provided that the change does not turn out to be contrary to the intention of the author of the reservation, as manifested at the time the reservation was formulated:

> "Once it is established that the expression 'the territorial status of Greece' was used in Greece's instrument of accession [to the 1928 General Act] as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time. This presumption, in the view of the Court, is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like 'domestic jurisdiction' and 'territorial status' were intended to have a fixed content regardless of the subsequent evolution of international law."[2193]

4.3 Effect of an objection to a valid reservation

Unless the reservation has been established with regard to an objecting State or organization, the formulation of an objection to a valid reservation precludes the reservation from having its intended effects as against that State or international organization.

Commentary

(1) Unlike acceptance of a valid reservation, an objection to a reservation may produce a variety of effects as between the author of the reservation and the author of the objection. The choice is left to a great extent (but not entirely) to the latter, which can vary the potential legal effects of the reservation-objection pair. For example, it may choose, in accordance with article 20, paragraph 4 (b), of the Vienna Conventions, to preclude the treaty from entering into force as between itself and the reserving State by "definitely" expressing that intention. But the author of the objection may also elect not to oppose the entry into force of the treaty as between itself and the author of the reservation or, to put it more precisely, may refrain from expressing a contrary intention. In that case, if the treaty does actually enter into force for the two parties,[2194] the treaty relations between the author of the reservation and the author of the objection are modified in accordance with article 21, paragraph 3, of the Vienna Conventions. Thus, objections to a valid reservation may have a number of effects on the very existence of treaty relations or on their content, and those effects may vary with respect to the same treaty and the same reservation.

(2) The primary function and the basic effect of every objection are, however, very simple. Unlike acceptance, an objection constitutes its author's rejection of the reservation. As the International Court of Justice clearly stated in its 1951 advisory opinion,

> "no State can be bound by a reservation to which it has not consented".[2195]

This is the fundamental effect of the same principle of mutual consent that underlies all treaty law and, in particular, the regime of reservations: the treaty is a consensual instrument par excellence, drawing its strength from the *will* of States. Reservations are substantially linked to the State's consent to be bound by the treaty.[2196]

[2193] *Aegean Sea Continental Shelf (Greece v. Turkey)*, footnote 2183 above, p. 32, para. 77. See also Judgment of 13 July 2009, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, para. 65.

[2194] On the question of when the treaty enters into force for the author of the reservation, see guidelines 4.2.1 and 4.2.3, 4.3.1 and 4.3.4 and commentaries.

[2195] *I.C.J. Reports 1951*, footnote 604 above, p. 26.

(3) Thus, an objection may be viewed first and foremost as the objecting State's refusal to consent to the reservation and, as such, it prevents the establishment of the reservation with respect to the objecting State or international organization within the meaning of article 21, paragraph 1, of the Vienna Conventions and of guideline 4.1. As the Commission points out in its commentary to guideline 2.6.1 (Definition of objections to reservations):

> "The refusal to accept a reservation is precisely the purpose of an objection in the full sense of the word in its ordinary meaning."[2197]

(4) Unlike an acceptance, an objection makes the reservation non-opposable to the author of the objection. Clearly, this effect can be produced only where the reservation has not already been accepted (expressly or tacitly) by the author of the objection. Acceptance and objection are mutually exclusive, and definitively so, at least insofar as the effects of acceptance are concerned. In this regard, guideline 2.8.13 states:

> "Acceptance of a reservation cannot be withdrawn or amended."

The phrase introducing guideline 4.3 refers implicitly to this principle, even if the Commission chose not to overload the guideline — it serves to introduce section 4.3 as a whole — with a specific reference.

(5) In order to highlight the fundamental function of objections, guideline 4.3, which begins the section of the Guide to Practice on the effect of an objection to a valid reservation, sets out the principle whereby an objection prevents the reservation from producing the effects intended by its author.[2198] This constitutes an initial clarification of the meaning of the phrase "the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation", which appears at the end of article 21, paragraph 3, of the Vienna Conventions and the meaning of which is clarified further in guideline 4.3.6.

(6) The neutralization of a reservation's effect as it applies to the State or international organization that is the author of the objection is, however, far from answering all the questions concerning the effects of an objection. The objection may in fact have several different effects, both on the entry into force of the treaty (as described in guidelines 4.3.1 to 4.3.5) and, once the treaty has entered into force, if it does, for the author of the reservation and the author of the objection, on the content of the treaty relations thus established (dealt with in guidelines 4.3.6 to 4.3.8).

(7) There is, however, a situation in which an objection does not produce the normal effects described in guideline 4.3. It is the case in which a State or organization member of an international organization formulates an objection to a reservation formulated by another State or another international organization to the constituent instrument of the organization. Such an objection, regardless of its content, would be devoid of legal effects, in line with guideline 2.8.12 (Reaction by a member of an international organization to a reservation to its constituent instrument), according to which:

[2196] See, for example, the report of the International Law Commission on the work of its forty-ninth session (A/52/10), *Yearbook ... 1997*, vol. II (Part Two), p. 49, para. 83.

[2197] Paragraph (13) of the commentary to guideline 2.6.1.

[2198] It will be recalled that guidelines 1.1 and 1.1.1 define reservations in terms of the intended object of the State or international organization formulating them.

"Guideline 2.8.10 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects."[2199]

4.3.1 Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation

An objection by a contracting State or by a contracting organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, except in the case mentioned in guideline 4.3.5.

Commentary

(1) As the Commission indicated in its commentary to guideline 2.6.7, the Vienna Conventions do not give any indication of the time at which the intention to oppose the entry into force of the treaty must be expressed by the author of the objection.[2200] The Commission did, however, conclude that, in accordance with the presumption established in article 20, paragraph 4 (b), of the Vienna Conventions, an objection not accompanied by a clear expression of such an intention does not preclude the entry into force of the treaty as between the author of the objection and the author of the reservation or, in certain cases, the entry into force of the treaty itself. This legal effect cannot be called into question by the subsequent expression of a contrary intention. This idea has already been expressed in guideline 2.6.7, which provides that the intention to oppose the entry into force of the treaty must have been expressed "before the treaty would otherwise enter into force between [the author of the objection and the author of the reservation]".[2201] However, that guideline concerns the procedure for formulating the required intention and not its effects; it therefore seemed useful to reiterate the principle in the part of the Guide to Practice dealing with the legal effect of objections. Nevertheless, guideline 4.3.1 uses the expression "does not preclude the entry into force of the treaty", which implies that the treaty was not in force as between the author of the reservation and the author of the objection when the reservation was made.

(2) Concretely, the consequence of the non-entry into force of the treaty as between the author of the reservation and the author of the objection is that no treaty relationship exists between them – even if, as is often the case, both can be considered parties to the treaty within the meaning of the Vienna Conventions. The mere fact that one party rejects the reservation and does not wish to be bound by the provisions of the treaty in its relations with the author of the reservation does not necessarily mean that the latter cannot become a contracting State or contracting organization in accordance with guideline 4.2.1. It is sufficient, under the general regime, for another State or another international organization to accept the reservation expressly or tacitly for the author of the reservation to be considered a contracting State or contracting organization to the treaty. The absence of a treaty relationship between the author

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[2199] Guideline 2.8.8 (Acceptance of a reservation to the constituent instrument of an international organization) reads: "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization."

[2200] Paragraph (4) of the commentary to guideline 2.6.7 (Expression of intention to preclude the entry into force of the treaty).

[2201] See also paragraph (5) of the commentary to guideline 2.6.7.

of a maximum-effect objection and the author of the reservation does not *a priori* have any effect except between them.[2202]

(3) In the absence of a definite expression of the contrary intention, an objection — which can be termed "simple" — to a valid reservation does not *ipso facto* result in the entry into force of the treaty as between the author of the reservation and the author of the objection, as would be the case for an acceptance. This, in fact, is one of the fundamental differences between a simple objection and acceptance, one which, along with other considerations, means that such an objection is not "tantamount to acceptance",[2203] contrary to what has often been asserted.[2204] Pursuant to article 20, paragraph 4 (b), of the Vienna Conventions, reproduced in guideline 4.3.5, such an objection "does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or international organization". Yet while such an objection does not preclude the entry into force of the treaty, it remains neutral on the question as to whether or not the reserving State or organization becomes a contracting State or contracting organization to the treaty, and does not necessarily result in the entry into force of the treaty as between the author of the objection and the author of the reservation.

(4) This effect — or rather lack of effect — of a simple objection on the establishment or existence of a treaty relationship between the author of the objection and the author of the reservation derives directly from the wording of article 20, paragraph 4 (b), of the Vienna Conventions, as States sometimes point out when formulating an objection. The objection by the Netherlands to the reservation formulated by the United States of America to the International Covenant on Civil and Political Rights is a particularly eloquent example:

> "Subject to the proviso of article 21, paragraph 3 of the Vienna Convention of the Law of Treaties, these objections *do not constitute an obstacle to the entry into force of the Covenant between the Kingdom of the Netherlands and the United States*."[2205]

The Netherlands deemed it useful to reiterate that its objection did not constitute an "obstacle" to the entry into force of the treaty with the United States, and that if the treaty came into force, their treaty relationship would have to be determined in accordance with article 21, paragraph 3, of the Vienna Convention.

(5) This effect — or lack of effect — of a simple objection on the entry into force of the treaty is spelled out in guideline 4.3.1, which, apart from a few minor changes, faithfully reproduces the language of article 20, paragraph 4 (b), of the 1986 Vienna Convention.

[2202] The International Court of Justice recognized in 1951 that "such a decision will only affect the relationship between the State making the reservation and the objecting State". (*I.C.J. Reports 1951*, footnote 604 above, p. 26). See, however, paragraph (1) of the commentary to guideline 4.3.4 below.

[2203] See A. Pellet and D. Müller, footnote 1048 above, pp. 37 to 59, *passim*.

[2204] See comments by Yasseen (*Yearbook ... 1965*, vol. I, 814th meeting, 29 June 1965, p. 271, para. 5) and the doubts expressed by Tsuruoka (*ibid.*, 800th meeting, 11 June 1965, p. 174, para. 40); J.K. Koh, footnote 1447 above, p. 102; M. Coccia, footnote 196 above, p. 35; G. Gaja, footnote 28 above, pp. 326–329; J. Klabbers, "Accepting the Unacceptable? A new Nordic Approach to Reservations to Multilateral Treaties", *Nordic Journal of International Law*, vol. 69 (2000), p. 181; J.-M. Ruda, footnote 56 above, pp. 198–199; L. Sucharipa-Behrmann, footnote 1261 above, p. 74; K. Zemanek, footnote 1915 above, pp. 332–333. See also the first report on the law and practice relating to reservations to treaties (A/CN.4/470), *Yearbook ... 1995*, vol. II (Part One), p. 121.

[2205] *Multilateral Treaties ...*, chap. IV.4 (emphasis added).

4.3.2 Effect of an objection to a reservation that is formulated late

If a contracting State or a contracting organization to a treaty objects to a reservation whose late formulation has been unanimously accepted in accordance with guideline 2.3.1, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

Commentary

(1) Guideline 4.3.2 draws the consequences, in terms of the effects of an objection, of the rules set out in guidelines 2.3.1 (Acceptance of the late formulation of a reservation) and 2.3.2 (Time period for formulating an objection to a reservation that is formulated late).

(2) It is clear from guideline 2.3.1 that acceptance of the late formulation of a reservation is, in principle, impossible, and that even one objection to such late formulation is sufficient to prevent it from having any effect whatsoever. This is necessarily the meaning of the phrase: "if no contracting State or contracting organization has opposed such formulation".

(3) However, such "opposition" should not be confused with objections to the content of the reservation in the sense of articles 20 to 23 of the Vienna Conventions. The Conventions preclude a valid reservation from producing all its effects in the relations between its author and an objecting State or international organization, whereas opposition to the late formulation of a reservation "voids" the reservation as such. Moreover, it was to avoid this confusion that the Commission, in guidelines 2.3.1 to 2.3.3, used different terminology to distinguish between these two categories of reactions to a reservation that is formulated late.[2206]

(4) In the case of (unanimous) absence of opposition to the late formulation of the reservation, contracting States and organizations may still make an objection within 12 months, as provided for under guideline 2.3.2. Guideline 4.3.2 deals with cases in which such an objection is formulated.

(5) The legal effects of such an objection are no different, in principle, from those of an objection made to a reservation made in good time. The objection prevents the establishment of a valid reservation — or a reservation that has become formally valid as a result of the unanimous acceptance of the late formulation — in that it rejects acceptance of its content and the effects it purports to produce. The rules and guidelines concerning the legal effects of an objection are therefore, in principle, applicable.

(6) Nevertheless, guideline 4.3.2 limits the effects of an objection made to a reservation that was formulated late. It must be remembered that, hypothetically, the author of the reservation that was formulated late has already become a contracting State or contracting organization through its consent to be bound which, initially, was not accompanied by a reservation. The status of the State or international organization cannot be called into question, *a posteriori* without overly threatening the security of treaty relations. An objection can therefore not have the effect of precluding the establishment of treaty relations between the author of the reservation formulated late and the author of the objection – relations which, hypothetically, have already been established. Guideline 4.3.2 repeats this requirement by specifying that the treaty enters into or remains in force between the author of the reservation and the author of the objection. This does not mean, however, that the objection produces no effects: it precludes the establishment of the reservation with regard to the author of the objection, and the effects of the objection on the content of the treaty relations established

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[2206] See paragraph (1) of the commentary to guideline 2.3.2.

between the author of the reservation and the author of the objection are determined in accordance with the are generally applicable rules.

(7) This does not mean, however, that a State or international organization that becomes a contracting State or contracting organization after expiry of the time limit specified in guideline 2.3.1 cannot make an objection with maximum effect. Since no treaty relations have yet existed between this State or international organization and the author of the reservation, the reasoning behind the rule set out in guideline 4.3.2 does not apply.

4.3.3 Entry into force of the treaty between the author of a reservation and the author of an objection

The treaty enters into force between the author of a valid reservation and the objecting contracting State or contracting organization as soon as the author of the reservation has become a contracting State or a contracting organization in accordance with guideline 4.2.1 and the treaty has entered into force.

Commentary

(1) Guideline 4.3.3 defines the moment at which the treaty enters into force as between the author of an objection and the author of the reservation.

(2) For this to happen, it is both necessary and sufficient for the treaty to enter into force and for both the author of the reservation and the author of the objection to be contracting States or contracting international organizations to the treaty. In other words, the reservation must have been established by the acceptance of another State or international organization, in the sense of guideline 4.2.1. Hence, apart from the scenario envisaged in guideline 4.3.4, the entry into force of the treaty as between the author of the objection and the author of the reservation is in no way dependent on the objection itself, but rather on the establishment of the reservation; the objection plays no role in the establishment of the reservation.

(3) In concrete terms, a treaty that is subject to the general regime of consent to reservations as established by article 20, paragraph 4, of the Vienna Conventions enters into force for the reserving State or international organization only if the reservation has been accepted by at least one other contracting State or one other contracting organization (in accordance with article 20, paragraph 4 (c)). Only if the reservation is thus established may treaty relations be instituted between the author of the reservation and the author of a simple objection. Their treaty relations are, however, subject to the restrictions set out in article 21, paragraph 3, of the Vienna Conventions.[2207]

4.3.4 Non-entry into force of the treaty for the author of a reservation when unanimous acceptance is required

If the establishment of a reservation requires the acceptance of the reservation by all the contracting States and contracting organizations, any objection by a contracting State or by a contracting organization to a valid reservation precludes the entry into force of the treaty for the reserving State or organization.

[2207] See guideline 4.3.4.

Commentary

(1) The principle set out in guideline 4.3.3 is not applicable in cases in which, for one reason or another, unanimous acceptance by the contracting States and contracting organizations is required in order to "establish" the reservation, as in the case of a treaty that must be applied in its entirety,[2208] for example. In such cases, any objection — simple or qualified — has a much more significant effect with regard to the entry into force of the treaty as between all the contracting States and contracting organizations, on the one hand, and the author of the reservation, on the other. The objection, in fact, prevents the reservation from being established as such. Even if article 20, paragraph 4 (b), of the Vienna Conventions were to apply to this situation — which is far from certain, in view of the *chapeau* of the paragraph[2209] — the reservation could not be established and, consequently, the author of the reservation could never become a contracting State or contracting organization. Here an objection — whether simple or qualified — constitutes an insurmountable obstacle both for the author of the reservation and for all the other contracting States or contracting organizations in relation to the establishment of treaty relations with the author of the reservation. Only the withdrawal of the reservation or of the objection would resolve the situation.

(2) Although such a solution could already be deduced by looking at guideline 4.1.2 in conjunction with guideline 4.2.1, it is worth recalling this significant effect of an objection to a reservation that requires unanimous acceptance.

4.3.5 Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect

An objection by a contracting State or a contracting organization to a valid reservation precludes the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, if the objecting State or organization has definitely expressed an intention to that effect in accordance with guideline 2.6.7.

Commentary

(1) Article 20, paragraph 4 (b), of the Vienna Conventions leaves no doubt as to the effect of an objection accompanied by the definitely expressed intention not to apply the treaty as between the author of the objection and the author of the reservation, in line with guideline 2.6.7 (Expression of intention to preclude the entry into force of the treaty). In this case, the objection produces what is often referred to as "maximum effect".

(2) This rule is the subject of guideline 4.3.5, which basically echoes the language of article 20, paragraph 4 (b), of the 1986 Vienna Convention.

(3) It is clear from that provision — which, apart from the reference to an international organization, is identical to the corresponding provision of the 1969 Convention — that, in principle, an objection to a reservation does not constitute an obstacle to the entry into force of the treaty as between the objecting State and the reserving State:

> "[A]n objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization …"

[2208] See guideline 4.1.2 above and, in particular, paragraphs (9) to (11) of the commentary.

[2209] "In cases not falling under the preceding paragraphs and unless the treaty otherwise provides ..."

(4) While such a "simple" or "minimum-effect" objection[2210] does not have as its immediate effect the entry into force of the treaty in relations between the two States (or organizations), as is the case with an acceptance,[2211] it does not preclude it.

(5) This is, however, a presumption that can be reversed by the author of the objection. Article 20, paragraph 4 (b), of the 1986 Vienna Convention continues: "... unless a contrary intention is definitely expressed by the objecting State or organization". Thus, the author of the objection may also elect to have no treaty relations with the author of the reservation, provided that it does so "definitely". These are often referred to as objections "with maximum effect".

(6) The system established by the Vienna Conventions in that regard corresponds to the approach taken by the International Court of Justice since 1951, according to which:

> "... each State objecting to it will or will not ... consider the reserving State to be a party to the Convention".[2212]

(7) The direction of the presumption may be surprising. Traditionally, in keeping with the strict principle of consent, the immediate effect of an objection was that the reserving State could not claim to be a State party to the treaty;[2213] the "maximum" effect of an objection was thus the rule. This outcome was necessary under the system of unanimity, in which a single objection compromised the unanimous consent of the other contracting States; no derogation was possible. The reserving State was required either to withdraw or to modify its reservation in order to become a party to the treaty. This rule was considered so self-evident that the Commission's first special rapporteurs, who held to the system of unanimity, did not even formulate it in any of their reports.

(8) The revolution introduced by the flexible system to which Waldock was won over[2214] did not, however, lead him to reject the traditional principle whereby "the objections shall preclude the entry into force of the treaty".[2215] The Special Rapporteur did, however, allow for one major difference as compared with the traditional system, in that he considered that objections had only a relative effect: rather than preventing the reserving State from becoming a party to the treaty, an objection came into play only in the relations between the reserving State and the objecting State.[2216]

(9) However, in order to align the draft with the solution proposed in the 1951 advisory opinion of the International Court of Justice,[2217] and in response to the criticisms and

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[2210] See, for example, R. Riquelme Cortado, footnote 150 above, pp. 279–280; and F. Horn, footnote 25 above, pp. 170–172.

[2211] Provided that the treaty itself is in force or becomes so as a result of accession by the accepting State or international organization (see guidelines 4.2.1 to 4.2.3 and commentaries, in particular paragraphs (4) to (6) of the commentary to guideline 4.2.1, paragraph (2) of the commentary to guideline 4.2.2 and paragraph (4) of the commentary to guideline 4.2.3).

[2212] *I.C.J. Reports 1951*, footnote 604 above, p. 26.

[2213] P.-H. Imbert, footnote 15 above, pp. 155 and 260.

[2214] A. Pellet, "Article 19 (1969)", footnote 1454 above, pp. 664–668, paras. 44–55; and 1969 Vienna Convention Article 19, footnote 1454 above, vol. I, pp. 414–415, paras. 15–20.

[2215] See draft article 19, paragraph 4 (c), presented by Waldock in 1962 in his first report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 62. This solution is, moreover, frequently offered as the only one that makes sense. See, for example, P. Reuter, footnote 1118 above, p. 76, para. 134.

[2216] On this point, see also the Commission's commentary to draft article 20, paragraph 2 (b) (*Yearbook ... 1962*, vol. II, p. 181, para. 23).

[2217] See footnote 2212 above.

misgivings expressed by many Commission members,[2218] the radical solution proposed by Waldock was abandoned in favour of a simple presumption of maximum effect, leaving minimum effect available as an option. Draft article 20, paragraph 2 (b), as adopted on first reading, provided:

> "An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State."[2219]

(10) During the debate on the Commission's draft in the Sixth Committee of the General Assembly, however, the Czechoslovak and Romanian delegations argued that the presumption should be reversed, so that the rule would "be more likely to broaden treaty relations among States and to prevent the formation of an undesirable vacuum in the legal ties between States".[2220] Nonetheless, despite the favourable comments of some Commission members during the second reading of the draft,[2221] this position was not retained in the Commission's final draft.

(11) The issue arose again, however, during the Vienna Conference. The proposals of Czechoslovakia,[2222] Syria[2223] and the Union of Soviet Socialist Republics[2224] were aimed at reversing the presumption adopted by the Commission. Although it was characterized by some delegations[2225] as innocuous, the reversal of the presumption constituted a major shift in the logic of the mechanism of acceptances and objections.[2226] That was why the notion of reversing the presumption was rejected in 1968.[2227] During the second session of the Conference, however, the Union of Soviet Socialist Republics once again submitted a similar amendment,[2228] which was debated at length, insisting on the sovereign right of each State to

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[2218] See, for example, Tunkin (*Yearbook ... 1962*, vol. I, 653rd meeting, 29 May 1962, p. 156, para. 26, and 654th meeting, 30 May 1962, p. 161, para. 11), Rosenne (*ibid.*, 653rd meeting, 29 May 1962, para. 30), Jiménez de Aréchaga (*ibid.*, p. 158, para. 48), de Luna (*ibid.*, p. 160, para. 66), Yasseen (*ibid.*, 654th meeting, 30 May 1962, p. 161, para. 6). The Special Rapporteur was also in favour of introducing the presumption (*ibid.*, pp. 162, paras. 17 and 20).

[2219] *Ibid.*, vol. II, p. 175 and p. 181, para. 23.

[2220] See the summary of the Czechoslovak and Romanian observations in the fourth report on the law of treaties, A/CN.4/177 and Add.1 and 2, *Yearbook ... 1965*, vol. II, p. 48.

[2221] See comments by Tunkin (*Yearbook ... 1965*, vol. I, 799th meeting, 10 June 1965, p. 167, para. 39) and Lachs (*ibid.*, 813th meeting, 29 June 1965, p. 268, para. 62).

[2222] A/CONF.39/C.1/L.85, in *Documents of the Conference* A/CONF.39/11/Add.2, footnote 54 above, p. 135.

[2223] *Ibid.*, A/CONF.39/C.1/L.94.

[2224] *Ibid.*, A/CONF.39/C.1/L.115, p. 133.

[2225] The United Arab Republic considered, for example, that those amendments were purely drafting changes (A/CONF.39/11, footnote 35 above, 24th meeting, 16 April 1968, p. 127, para. 24).

[2226] See the statement by the representative of Sweden on this subject, who noted that "the International Law Commission's formula might have the advantage of dissuading States from formulating reservations" (*ibid.*, 22nd meeting, 11 April 1968, p. 117, para. 35). The representative of Poland supported the amendments precisely because they favoured the formulation of reservations and the establishment of a treaty relationship (*ibid.*), which for Argentina "would be going too far in applying the principle of flexibility" (*ibid.*, 24th meeting, 16 April 1968, p. 129, para. 43).

[2227] *Ibid.*, 25th meeting, 16 April 1968, p. 135, paras. 35 ff.

[2228] A/CONF.39/L.3, in *Documents of the Conference*, footnote 54 above, pp. 265 and 266.

formulate a reservation and relying on the Court's 1951 advisory opinion.[2229] That amendment was finally adopted[2230] and the presumption of article 20, paragraph 4 (b), of the Convention, as proposed by the Commission, was reversed.

(12) The difficulties that the Conference encountered in adopting the Soviet amendment show clearly that reversal of the presumption was not as innocuous as Waldock, then Expert Consultant to the Conference, had indicated. The problem is not merely that of "formulating a rule one way or the other":[2231] this new formula, in particular, is at the origin of the doubts often expressed about the function of an objection and the real differences that exist between acceptance and objection.[2232]

(13) Still, the presumption has never been called into question since the adoption of the 1969 Vienna Convention. During the drafting of the 1986 Convention it was simply transposed by the Commission. It therefore seems neither possible nor truly necessary to undo the last-minute compromise that was struck at the Vienna Conference in 1969. According to the presumption that is now part of positive international law, the general rule remains that an objection does not preclude the entry into force of a treaty – a principle recalled in guideline 4.3.1, the exception being the absence of treaty relation between the author of the objection and the author of the reservation, an exception dealt with in guideline 4.3.5.

4.3.6 Effect of an objection on treaty relations

1. When a State or an international organization objecting to a valid reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the author of the reservation and the objecting State or organization, to the extent of the reservation.

2. To the extent that a valid reservation purports to exclude the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions to which the reservation relates.

3. To the extent that a valid reservation purports to modify the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions of the treaty as intended to be modified by the reservation.

4. All the provisions of the treaty other than those to which the reservation relates shall remain applicable as between the reserving State or organization and the objecting State or organization.

[2229] Notably the answer to the second question, in which the Court held that a State that has formulated an objection "can in fact consider that the reserving State is not party to the Convention" (see footnote 2212 above).

[2230] By 49 votes to 21, with 30 abstentions (*Second Session, Summary records*, footnote 332 above, 10th plenary meeting, 29 April 1969, p. 35, para. 79).

[2231] *Ibid.*, p. 34, para. 74. See also P.-H. Imbert, footnote 25 above, pp. 156–157.

[2232] F. Horn, footnote 25 above, pp. 172 and 173. See also A. Pellet and D. Müller, footnote 1048 above, pp. 37–59.

Commentary

(1) The range of potential effects of an objection is quite broad.[2233] The outright non-application of the treaty between the author of the reservation and the author of the objection is the most straightforward situation (objections with maximum effect, dealt with in guideline 4.3.5), but it is now infrequent, owing in particular to the reversal of the presumption in article 20, paragraph 4 (b), of the Vienna Conventions.[2234] The vast majority of objections are now intended to produce a very different effect: rather than opposing the entry into force of the treaty *vis-à-vis* the author of the reservation, the objecting State seeks to modify the treaty relations by adapting them to its own position. Under article 21, paragraph 3, of the Vienna Conventions, bilateral relations in such cases result in principle in the partial non-application of the treaty (objections with minimum effect, the consequences of which are complex and can vary depending on the content of the reservation, are described in guideline 4.3.6). State practice, however, has developed other types of objections with effects other than those envisaged by article 21, paragraph 3, of the Vienna Conventions, either by excluding the application of certain provisions of the treaty that are not (specifically) addressed by the reservation (objections with intermediate effect, whose legal regime is set out in guideline 4.3.7) or by claiming that the treaty applies without any modification (objections with "super-maximum" effect, covered in guideline 4.3.8).

(2) Guideline 4.3.6, which describes the effects of a "simple" objection between the author of a reservation and the objecting State or international organization, consists of four paragraphs:

- The first paragraph, which is of a general introductory nature, reproduces the text of article 21, paragraph 3, of the 1986 Vienna Convention while specifying that it concerns only objections to a valid reservation;
- The second and third paragraphs provide details regarding the effect of an objection on treaty relations, depending on whether the objection seeks to exclude or to modify the provision or provisions at which the reservation is directed;
- Lastly, the fourth paragraph states that, in principle, the objection has no effect on the other provisions of the treaty.

(3) Under the traditional system of unanimity, it was unimaginable that an objection could produce an effect other than non-participation by the author of the reservation to the treaty:[2235] the objection undermined unanimity and prevented the reserving State from becoming a party to the treaty. Since at the time that notion seemed self-evident, neither Brierly nor Fitzmaurice discussed the effects of objections to reservations, while Hersch Lauterpacht touched on them only briefly in his proposals de *lege ferenda*.[2236]

(4) Nor did Waldock find it necessary in his first report to take up the question of the effects of an objection to a reservation. This is explained by the fact that, according to his draft article 19, paragraph 4 (c), the objection precluded the entry into force of the treaty in the bilateral relations between the reserving State and the objecting State.[2237] Despite the shift away from this categorical approach in favour of simply a presumption, the draft articles

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[2233] See paragraph (4) of the introductory commentary to the fourth part of the Guide to Practice.

[2234] See paragraphs (1) to (5) of the commentary to guideline 4.3.5.

[2235] See D.W. Greig, footnote 28 above, p. 170.

[2236] Alternative drafts C and D of draft article 9, in his first report on the law of treaties (A/CN.4/63), *Yearbook ... 1953*, vol. II, p. 92.

[2237] See paragraph (8) of the commentary to guideline 4.3.5 above.

adopted on first reading said nothing about the concrete effect of an objection that did not preclude the entry into force of the treaty as between the author of the objection and the reserving State. Few States, however, expressed concern at that omission.[2238]

(5) Nevertheless, a comment by the United States of America[2239] drew the problem to the attention of the Special Rapporteur and the Commission. Although a situation where treaty relations were established despite an objection was deemed "unusual",[2240] which was certainly true at the time, the United States still considered it necessary to provide for such a situation and suggested the addition of a new paragraph, as follows:

> "Where a State rejects or objects to a reservation but considers itself in treaty relations with the reserving State, the provisions to which the reservation applies shall not apply between the two States."[2241]

(6) The arguments put forward by the United States convinced Sir Humphrey of the "logical" need to include this hypothesis in draft article 21. He proposed a new paragraph, the wording of which differed significantly from the United States proposal:

> "Where a State objects to the reservation of another State, but the two States nevertheless consider themselves to be mutually bound by the treaty, the provision to which the reservation relates shall not apply in the relations between those States."[2242]

(7) The International Court of Justice had expressed a similar view in its 1951 advisory opinion:

> "Finally, it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation."[2243]

(8) The Commission engaged in a very lively debate on the text of paragraph 3 proposed by Waldock. Castrén, who considered that the case of a reservation in respect of which a simple objection had been raised was already covered by draft article 21, paragraph 1 (b),[2244] was alone in his view. Most members[2245] considered it necessary, if not "indispensable"[2246] to introduce a provision "in order to forestall ambiguous situations".[2247] However, the members of the Commission were divided on how to explain the intended effect of the new paragraph proposed by the United States and the Special Rapporteur. Whereas Waldock's proposal emphasized the consensual basis of the treaty relations established despite the objection, the provision proposed by the United States seemed to imply that the intended effect originated only from the unilateral act of the objecting State, that is, from the objection,

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[2238] Only two States explicitly raised the issue. See the comments of the Danish Government (Sir Humphrey Waldock, fourth report on the law of treaties (A/CN.4/177 and Add.1 and 2), *Yearbook ... 1965*, vol. II, p. 46) and the comments of the United States (*ibid.*, p. 47 and p. 55).

[2239] *Ibid.*, p. 55.

[2240] *Ibid.*

[2241] *Ibid.*

[2242] *Ibid.*, p. 55, para. 3 (Observations and proposals of the Special Rapporteur on article 21).

[2243] *I.C.J. Reports 1951*, see footnote 604, above, p. 27.

[2244] *Yearbook ... 1965*, vol. I, 800th meeting, 11 June 1965, p. 172, para. 15.

[2245] Ruda (*ibid.*, para. 13); Ago (*ibid.*, 814th meeting, 29 June 1965, pp. 271 and 272, paras. 7 and 11); Tunkin (*ibid.*, p. 271, para. 8) and Briggs (*ibid.*, p. 272, para. 14).

[2246] See the statement made by Ago (*ibid.*, p. 271, para. 7).

[2247] *Ibid.*

without the reserving State having a real choice. The two positions had their supporters within the Commission.[2248]

(9) The text that the Commission finally adopted on a unanimous basis,[2249] however, was very neutral and clearly showed that the issue had been left open by the Commission. The Special Rapporteur in fact stated that he was able to "agree with both currents of opinion about the additional paragraph" since "the practical effect of either of the two versions would be much the same and in that particular situation both States would probably be ready to regard the treaty as being in force between them without the reserved provisions".[2250]

(10) During the debate at the Vienna Conference on what would become article 21, paragraph 3, almost no problems were raised apart from a few unfortunate changes which the Conference fairly quickly reconsidered.

(11) An episode that occurred on that occasion is relevant however, for understanding article 21, paragraph 3. The Conference Drafting Committee, chaired by Yasseen — who, within the Commission, had expressed doubts regarding the difference between the respective effects of acceptance and objection on treaty relations,[2251] — proposed an amended text for article 21, paragraph 3, in order to take account of the new presumption in favour of the minimum effect of an objection, which had been adopted following the Soviet amendment.[2252] The amended text stated:

> "When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, *the reservation has the effects provided for in paragraphs 1 and 2.*"[2253]

(12) It would thus have been very clear that a simple objection was assumed to produce the same effect as an acceptance. Although the provision was adopted at one point by the Conference,[2254] a joint amendment was submitted by India, Japan, the Netherlands and the Union of Soviet Socialist Republics[2255] a few days before the end of the Conference with a view to replacing the last part of the sentence with the words originally proposed by the Commission, thereby restoring the distinction between the effects of an objection and those of an acceptance.

(13) The joint amendment was incorporated in the text by the Drafting Committee and adopted by the Conference.[2256] Yasseen explained that it was "necessary to distinguish

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[2248] Yasseen (*ibid.*, 800th meeting, 11 June 1965, p. 171, para. 7, p. 172, paras. 21–23 and p. 173, para. 26), Tunkin (*ibid.*, p. 172, para. 18) and Pal (*ibid.*, pp. 172–173, para. 24) expressed the same doubts as the Special Rapporteur (*ibid.*, p. 173, para. 31); in contrast, Rosenne, supported by Ruda (*ibid.*, p. 172, para. 13) considered that "the United States unilateral approach to the situation it had mentioned in its observations concerning paragraph 2 was more in line with the general structure of the Commission's provisions on reservations and preferable to the Special Rapporteur's reciprocal approach" (*ibid.*, para. 10).

[2249] *Ibid.*, 816th meeting, 2 July 1965, p. 284.

[2250] *Ibid.*, 800th meeting, 11 June 1965, p. 173, para. 31.

[2251] *Ibid.*, 814th meeting, 29 June 1965, p. 271, para. 5.

[2252] See paragraph (4) above.

[2253] *Summary records*, footnote 332 above, 11th plenary meeting, 30 April 1969, p. 36 (emphasis added).

[2254] *Ibid.*, para. 10 (94 votes to none).

[2255] A/CONF.39/L.49, in *Documents of the Conference*, footnote 54 above, p. 273.

[2256] *Ibid.*, 33rd plenary meeting, 21 May 1969, p. 181, para. 12.

between cases where a State objected to a reservation but agreed that the treaty should nevertheless come into force, and cases in which the reservation was accepted".[2257]

(14) The reinstatement of the text initially proposed by the Commission restores the true meaning and effects of objections and silences the doctrinal voices that question the distinctive nature of the institution of objections as opposed to acceptances.[2258]

(15) Paragraph 3 of article 21 of the 1969 Convention was not, however, an exercise in codification *stricto sensu* at the time of its adoption by the Commission and subsequently by the Conference. It had been included by the Commission "for the sake of completeness",[2259] but not as a rule of customary law.[2260] Although the Commission had drafted paragraph 3 in something of a hurry and the paragraph had led to debate and proposed amendments right up to the final days of the 1969 Vienna Conference, during the *travaux préparatoires* of the draft that became the 1986 Vienna Convention some members of the Commission nevertheless found the provision to be clear[2261] and acceptable.[2262] That seems to have been the position of the Commission as a whole, since the paragraph was adopted on first reading in 1977, with only the necessary editorial changes. That endorsement demonstrated the customary nature acquired by paragraph 3 of article 21,[2263] which was confirmed by the decision of the Court of Arbitration responsible for settling the dispute concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, which was rendered a few days later.[2264] The provision is an important element of the flexible system of reservations to treaties.

(16) What has come to be considered the "normal" effect of an objection to a valid reservation is thus set forth in article 21, paragraph 3, of the Vienna Conventions. This provision, in its fuller 1986 version, provides:

> "When a State or an international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation."

(17) Despite the apparent complexity of the wording, the sense of the provision is clear: as soon as the treaty has entered into force in the bilateral relations between the author of the reservation and the author of the objection — an element that article 21, paragraph 3, does not specify but which is self-evident — the provision or provisions to which the reservation relates shall be excised from their treaty relations to the extent of the reservation. Article 21, paragraph 3, however, calls for three remarks.

(18) First, the intended effect of an objection is diametrically opposed to that of an acceptance. Acceptance has the effect of modifying the legal effect of the provisions to which the reservation relates to the extent of the reservation, whereas an objection excludes the application of those provisions to the same extent.[2265] Even though in certain specific cases

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[2257] *Ibid.*, para. 2.

[2258] See the references to the literature cited in footnote 2204 above.

[2259] *Yearbook ... 1966*, vol. II, p. 209, para. (2) of the commentary to draft article 19.

[2260] R.W. Edwards, footnote 59 above, p. 398.

[2261] Calle y Calle, *Yearbook ... 1977*, vol. I, 1434th meeting, 6 June 1977, p. 98, para. 8.

[2262] Tabibi, *ibid.*, para. 7.

[2263] R.W. Edwards, footnote 59 above, p. 398; G. Gaja, footnote 28 above, p. 308.

[2264] Decision of 30 June 1977, *UNRIAA*, vol. XVIII, p. 3.

[2265] See A. Pellet and D. Müller, footnote 1048 above, in particular pp. 46–54.

the actual effect on the treaty relations established despite the objection may be identical to that of an acceptance,[2266] the legal regimes of the reservation/acceptance pair and the reservation/objection pair are nevertheless clearly different in law.

(19) Secondly, it is surprising — and regrettable — that paragraph 3 does not expressly limit its scope of application to reservations that are "valid" in the sense of articles 19 and 23 of the Vienna Conventions, as is the case in paragraph 1.[2267] It is nevertheless the case that an objection to an invalid reservation cannot produce the effect specified in paragraph 3,[2268] even though State practice would appear to allow this in certain respects. States often object to reservations that they consider to be impermissible as being incompatible with the object and purpose of a treaty without opposing the entry into force of the treaty, or indeed expressly state that their objection does not preclude the entry into force of the treaty in their relations with the reserving State.

(20) A telling example is that of the objection of the Federal Republic of Germany to the reservation formulated by Myanmar to the Convention on the Rights of the Child:

> "The Federal Republic of Germany considers that the reservations made by the Union of Myanmar regarding articles 15 and 37 of the Convention on the Rights of the Child are incompatible with the object and purpose of the Convention (art. 51, para. 2) and therefore objects to them.
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> "This objection shall not preclude the entry into force of the Convention as between the Union of Myanmar and the Federal Republic of Germany."[2269]

(21) This example is far from isolated. There are numerous objections in which, despite the conviction expressed by their authors as to the impermissibility of the reservation, the authors do not oppose the entry into force of the treaty and say so clearly,[2270] while also expressly

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[2266] On this question, see paragraph (39) below.

[2267] "1. A reservation established with regard to another party in accordance with articles 19, 20 and 23 …"; see guideline 4.1 (Establishment of a reservation with regard to another State or organization) and commentary.

[2268] See guideline 4.5.1 (Nullity of an invalid reservation) and commentary.

[2269] *Multilateral Treaties* …, chap. IV.11.

[2270] See also, among many examples, the objections of Belgium to the reservations of Egypt and Cambodia to the Vienna Convention on Diplomatic Relations (*ibid.*, chap. III.3) or the objections of Germany to several reservations to the same Convention (*ibid.*). It is, however, interesting to note with regard to the German objection, which considers certain reservations to be "incompatible with the letter and spirit of the Convention", that the Government of Germany has stated only for certain objections that they do not preclude the entry into force of the treaty between Germany and the respective States, without expressly taking a position in the other cases where it objected to a reservation for the same reasons. Numerous examples can be found in the objections to the reservations formulated to the International Covenant on Civil and Political Rights: in particular the objections raised to the reservation of the United States of America to article 6 of the Covenant by Belgium, Denmark, Finland, France, Italy, the Netherlands, Norway, Portugal, Spain and Sweden (*ibid.*, chap. IV.4). All those States considered the reservation to be incompatible with the object and purpose of the Covenant, but nonetheless did not oppose the entry into force of the Covenant in their relations with the United States, unlike Germany, which did not stay silent on that point even though its objection was also motivated by the incompatibility of the United States reservation "with the text as well as the object and purpose of article 6" (*ibid.*). The same remarks apply to the objection of Poland to the reservations formulated by Pakistan at the time of its accession to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*ibid.*, chap. IV.9). Nor is the phenomenon limited to human rights treaties: see also the objections of Austria, France, Germany and Italy to the reservation of Viet Nam to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (*ibid.*, chap. VI.19).

indicating, at times, that only the provisions to which the reservation relates shall not apply in the relations between the two States.[2271] Simple objections (or objections having "minimum effect") to reservations considered to be invalid are thus far from being a matter of mere speculation.[2272]

(22) The Vienna Conventions do not resolve this thorny issue and seem to treat the effects of objections on the content of treaty relations independently from the issue of the validity of reservations. On this point, one might consider that the Conventions have gone further than necessary in de-linking the criteria for the validity of reservations and the effects of objections. It is one thing to allow States and international organizations to object to any reservation,[2273] whether valid or invalid, and another to assign identical effects to all these objections. Moreover, as guidelines 4.5.1 and 4.5.3 indicate, article 21, paragraph 3, of the Vienna Conventions does not apply to objections to reservations that do not meet the conditions for validity set out in article 19 (or guideline 3.1) and 23 (or guidelines 2.1.1 to 2.1.7 and 2.2.1).[2274] For this reason each of the first three paragraphs of guideline 4.3.5 specify that they apply only to objections to valid reservations.

(23) Thirdly, although it is clear from article 21, paragraph 3, of the Vienna Conventions that the provisions to which the reservation relates[2275] do not apply *vis-à-vis* the author of the objection, the phrase "to the extent of the reservation" leaves one "rather puzzled"[2276] and requires further clarification.

(24) The decision of the Court of Arbitration in the case concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*[2277] clarifies the meaning to be given to this phrase. France had, at the time of ratification, formulated a reservation to article 6 of the Geneva Convention on the Continental Shelf of 1958, the relevant portion of which reads as follows:

> "[T]he Government of the French Republic will not accept that any boundary of the continental shelf determined by application of the principle of equidistance shall be invoked against it:

[2271] See, for example, the objection by Belgium to the reservations of several States to the Vienna Convention on Diplomatic Relations: "The Government of the Kingdom of Belgium objects to the reservations made with respect to article 27, paragraph 3, by Bahrain and with respect to article 37, paragraph 2, by the United Arab Republic [now the Arab Republic of Egypt], Cambodia [now the Khmer Republic] and Morocco. The Government nevertheless considers that the Convention remains in force as between it and the aforementioned States, respectively, except in respect of the provisions which in each case are the subject of the said reservations" (*Multilateral Treaties* ..., chap. III.3; see also the objection of the Netherlands to the reservation formulated by the United States to the International Covenant on Civil and Political Rights, cited in paragraph (4) of the commentary to guideline 4.3.1).

[2272] K. Zemanek, footnote 1915 above, p. 331.

[2273] See the commentary to guideline 2.6.2, paragraphs (1) to (9).

[2274] See in particular G. Gaja, "Il regime della Convenzione di Vienna concernente le riserve inammissibili", in *Studi in onore di Vincenzo Starace* (Naples, Ed. Scientifica, 2008), pp. 349–361.

[2275] The term "provisions" should not be interpreted too narrowly here. It may refer to an article or several articles of the treaty, or simply to a paragraph, a sentence or a phrase, or even to the treaty as a whole with respect to certain specific aspects. See also D.W. Bowett, cited below, para. (29).

[2276] As the representative of the United States of America expressed it at the Vienna Conference, *Second Session, Summary Records* (A/CONF.39/11/Add.1), footnote 332 above, 33rd plenary meeting, 21 May 1969, p. 181, para. 9.

[2277] See footnote 2264 above.

- If such boundary is calculated from baselines established after 29 April 1958;
- If it extends beyond the 200-metre isobath;
- If it lies in areas where, in the Government's opinion, there are 'special circumstances' within the meaning of article 6, paragraphs 1 and 2, that is to say: the Bay of Biscay, the Bay of Granville, and the sea areas of the Straits of Dover and of the North Sea off the French coast."[2278]

The Government of the United Kingdom objected to this part of the French reservation, stating only that:

> "The Government of the United Kingdom are unable to accept the reservations made by the Government of the French Republic."[2279]

(25) Before the Court of Arbitration, France maintained that on account of the combined effect of its reservation and the objection by the United Kingdom, and in accordance with the principle of mutuality of consent, article 6 as a whole was not applicable in relations between the two parties.[2280] The United Kingdom took the view that, in accordance with article 21, paragraph 3, of the Vienna Convention — which had at the time not entered into force and had not even been signed by France — "the French reservations cannot render Article 6 inapplicable *in toto*, but at the most 'to the extent of the reservation'".[2281]

(26) The Court found that:

> "[T]he answer to the question of the legal effect of the French reservations lies partly in the contentions of the French Republic and partly in those of the United Kingdom. Clearly, the French Republic is correct in stating that the establishment of treaty relations between itself and the United Kingdom under the Convention depended on the consent of each State to be mutually bound by its provisions; and that when it formulated its reservations to article 6 it made its consent to be bound by the provisions of that article subject to the conditions embodied in the reservations. There is, on the other hand, much force in the United Kingdom's observation that its rejection was directed to the reservations alone and not to article 6 as a whole. In short, the disagreement between the two countries was not one regarding the recognition of article 6 as applicable in their mutual relations but one regarding the matters reserved by the French Republic from the application of article 6. The effect of the United Kingdom's rejection of the reservations is thus limited to the reservations themselves."[2282]

The Court went on to say:

> "[H]owever, the effect of the rejection may properly, in the view of the Court, be said to render the reservations non-opposable to the United Kingdom. Just as the effect of the French reservations is to prevent the United Kingdom from invoking the provisions of Article 6 except on the basis of the conditions stated in the reservations, so the effect of their rejection is to prevent the French Republic from imposing the reservations on the United Kingdom for the purpose of invoking against it as binding a delimitation made on the basis of the conditions contained in the reservations. Thus, the combined

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[2278] *Multilateral Treaties* ..., chap. XXI.4.

[2279] *Ibid.*

[2280] See note 2264 above, pp. 40–41, para. 57.

[2281] *Ibid.*, p. 41, para. 58.

[2282] *Ibid.*, para. 59.

> effect of the French reservations and their rejection by the United Kingdom is neither to render Article 6 inapplicable *in toto*, as the French Republic contends, nor to render it applicable *in toto*, as the United Kingdom primarily contends. It is to render the article inapplicable as between the two countries to the extent, but only to the extent, of the reservations; and this is precisely the effect envisaged in such cases by Article 21, paragraph 3 of the Vienna Convention on the Law of Treaties and the effect indicated by the principle of mutuality of consent."[2283]

(27) The 1977 decision not only confirms the customary nature of article 21, paragraph 3,[2284] but also shows that the objective of this provision — which derives from the same principle of mutuality of consent — is to safeguard as much as possible the agreement between the parties. One should not exclude the application of the entirety of the provision or provisions to which a reservation relates, but only of the parts of those provisions concerning which the parties have expressed disagreement.

(28) In the case of France and the United Kingdom, that meant accepting that article 6 remained applicable as between the parties apart from the matters covered by the French reservation. This is what should be understood by "to the extent of the reservation". The effect sought by paragraph 3 is to preserve the agreement between the parties to the extent possible by reducing the application of the treaty to the provisions on which there is agreement and excluding the others, or, as Jean Kyongun Koh explains:

> "Here the Vienna Convention seems to be overtly seeking to preserve as much of the treaty as possible even when parties disagree about a reservation. ... The Vienna Convention tries to salvage as much as is uncontroversial about the relations between reserving and opposing States.[2285]

(29) Although the principle of article 21, paragraph 3, is clearer than is sometimes suggested, it is still difficult to apply, as noted by D.W. Bowett:

> "The practical difficulty may be that of determining precisely what part of the treaty is affected by the reservation and must therefore be omitted from the agreement between the two Parties. It may be a whole article, or a sub-paragraph of an article, or merely a phrase or word within the sub-paragraph. There can be no rule to determine this, other than the rule that by normal methods of interpretation and construction one must determine which are the 'provisions', the words, to which the reservation relates."[2286]

(30) Moreover, as Frank Horn rightfully notes:

> "A reservation does not only affect the provision to which it directly refers but may have repercussions on other provisions. An 'exclusion' of a provision, that is the introduction of an opposite norm, changes the context that is relevant for interpreting other norms. A norm seldom exists in isolation but forms an integrated part in a system of norms. The extent of a reservation does not necessarily comprise only the provision directly affected but also those provisions the application of which is influenced by the 'exclusion' or the 'modification'."[2287]

(31) Only the wording of the reservation, suitably interpreted, makes it possible to determine the provisions of the treaty or the specific aspects of the treaty the legal effect of

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[2283] *Ibid.*, p. 42, para. 61.

[2284] See paragraph (16) above.

[2285] Footnote 1447 above, p. 102.

[2286] D.W. Bowett, footnote 150 above, p. 86.

[2287] F. Horn, footnote 25 above, p. 178.

which the reserving State or international organization purports to exclude or modify. Those provisions or aspects of the treaty are, by virtue of an objection, not applicable in treaty relations between the author of the objection and the author of the reservation. By contrast, all the provisions or parts of provisions not affected by the reservation remain applicable as between the parties, as paragraph 4 of guideline 4.3.6 states.

(32) In principle, what should be excluded from relations between the two parties can be determined by asking what the reservation actually modifies in the treaty relations of its author *vis-à-vis* a contracting State or contracting organization that has accepted it.

(33) However, paragraph 1 of guideline 4.3.6 requires further clarification, depending on whether the reservation that is the subject of the objection purports to exclude or to modify the legal effect of certain provisions of the treaty. It is precisely this clarification that is provided in paragraphs 2 and 3 of the guideline.

(34) In order to clarify the content of the treaty relations between the author of the reservation and the objecting State or international organization, it is useful to recall the distinction between "modifying reservations" and "excluding reservations" employed in guideline 4.2.4 — the pattern of which guideline 4.3.5 generally follows — in order to determine the effects of an established reservation.

(35) Like paragraphs 2 and 3 of guideline 4.2.4, paragraphs 2 and 3 of guideline 4.3.6 begin with the phrase "to the extent that", to reflect the fact that a single reservation can have both excluding and modifying effects.[2288] The expressions "purports to exclude" or "purports to modify", which are the very expressions used in article 2, paragraph 1 (d), of the Vienna Conventions and are reproduced in guideline 1.1 of the Guide to Practice in the definition of reservations, are in contrast to the verbs "exclude" and "modify", which appear in the corresponding provisions of guideline 4.2.4 in order to indicate that the reservations referred to in guideline 4.3.6 cannot be considered to be "established" in respect of the author of the objection since, *ex hypothesi*, the latter has not accepted them but has, on the contrary, objected to them.

(36) The case of excluding reservations is more straightforward. The Egyptian reservation to the 1961 Vienna Convention on Diplomatic Relations[2289] is a case in point. That reservation reads:

> "Paragraph 2 of article 37 shall not apply".[2290]

In treaty relations between the author of the reservation and the author of a simple objection, therefore, the Vienna Convention on Diplomatic Relations will apply without paragraph 2 of article 37. This provision does not apply, to the extent provided by the reservation: in other words, it does not apply at all. Its application is entirely excluded.

(37) Cuba made a reservation purporting to exclude the application of article 25, paragraph 1, of the Convention on Special Missions:

> "The Revolutionary Government of the Republic of Cuba enters an express reservation with regard to the third sentence of paragraph 1 of article 25 of the Convention, and consequently does not accept the assumption of consent to enter the

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[2288] See paragraph (3) of the commentary to guideline 4.2.4.

[2289] United Nations, *Treaty Series*, vol. 500, p. 95.

[2290] *Multilateral Treaties* ..., chap. III.3.

> premises of the special mission for any of the reasons mentioned in that paragraph or for any other reasons."[2291]

In this case, too, a (simple) objection results in the exclusion of the application of the third sentence of paragraph 1 of article 25 of the Convention. On the other hand, the rest of the provision remains in force between the two parties.

(38) Some types of excluding reservations are more complex, however. This is the case, for instance, with across-the-board reservations, that is, reservations that purport to exclude the legal effect of the treaty as a whole with respect to certain specific aspects.[2292] The reservation of Guatemala to the Customs Convention on the Temporary Importation of Private Road Vehicles of 1954 thus states:

> "The Government of Guatemala reserves its right:
>
> (1) To consider that the provisions of the Convention apply only to natural persons, and not to legal persons and bodies corporate as provided in chapter 1, article 1."[2293]

A purely mechanical application of article 21, paragraph 3, of the Vienna Conventions might suggest that the treaty relation established between the author of this reservation and an objecting State excludes the application of article 1 – the provision to which the reservation refers. But the fact that only article 1 is expressly referred to does not mean that the reservation applies only to that provision. In the specific example of Guatemala's reservation, it would be equally absurd to exclude only the application of article 1 of the Convention or to conclude that, because the reservation concerns all the provisions of the Convention (by excluding part of its scope of application *ratione personae*), a simple objection excludes all the provisions of the Convention. Only that which is effectively modified or excluded as a result of the reservation remains inapplicable in the treaty relations between the author of the reservation and the author of the simple objection: the application of the Convention as a whole to the extent that such application concerns legal persons.

(39) In these cases, but only in these cases,[2294] an objection produces in concrete terms the same effects as an acceptance: the exclusion of the legal effect, or application, of the provision to which the reservation relates "to the extent of the reservation"; an acceptance and a simple objection therefore result in the same treaty relations between the author of the reservation, on the one hand, and the author of the acceptance or of the simple objection, on the other. The literature agrees on this point.[2295] The similarity in the effects of an acceptance and a minimum-effect objection does not mean, however, that the two reactions are identical and that the author of the reservation "would get what it desired".[2296] Moreover, while an acceptance is tantamount to agreement, or at least to the absence of opposition to a

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[2291] *Ibid.*, chap. III.9.

[2292] See paragraph 2 of guideline 1.1 (Definition of reservations) and paragraphs (16) to (22) of the commentary thereto (*Yearbook ... 1999*, vol. II (Part Two), pp. 93–95).

[2293] *Multilateral Treaties ...*, chap. XI.A.8.

[2294] The same does not hold true for objections to modifying reservations – see guideline 4.3.6, and paragraph (41) below.

[2295] See for example B. Clark, footnote 1361 above, p. 308; M. Coccia, footnote 196 above, p. 36; G. Gaja, footnote 28 above, p. 327; P.-H. Imbert, footnote 25 above, p. 157; J.M. Ruda, footnote 56 above, p. 199; I. Sinclair, footnote 129 above, p. 76. See also the explanations of the representative of the Netherlands in respect of the four-State amendment, *Summary records* (A/CONF.39/11/Add.1), cited in footnote 332 above, 32nd plenary meeting, 20 May 1969, p. 179, para. 55; F. Horn, footnote 25 above, p. 173; J. Klabbers, footnote 2204 above, pp. 186–187.

[2296] J. Klabbers, footnote 2204 above, p. 179.

reservation, an objection cannot be considered mere "wishful thinking";[2297] it expresses disagreement and purports to protect the rights of its author much as a unilateral declaration (protest) does.[2298]

(40) In the light of these observations, paragraph 2 of guideline 4.3.6 clarifies the concrete effect of an objection to an excluding reservation by recognizing the similarity between the treaty relations established in the two cases.

(41) In contrast, in the case of modifying reservations, which are the subject of paragraph 3 of guideline 4.3.6, the difference between an objection and an acceptance is very clear. Whereas the establishment of such a reservation modifies the legal obligations between the author of the reservation and the contracting States or contracting organizations in respect of which the reservation is established, article 21, paragraph 3, excludes the application of all the provisions that potentially would be modified by the reservation, to the extent provided by the reservation. If a State makes a reservation that purports to replace one treaty obligation with another, article 21, paragraph 3, requires that the obligation potentially replaced by the reservation shall be excised from the treaty relations between the author of the reservation and the author of the simple objection. Neither the initial obligation, nor the modified obligation proposed by the reservation, applies: the former because the author of the reservation has not agreed to it and the latter because the author of the objection has in turn opposed it.[2299]

(42) Paragraph 3 of guideline 4.3.6 highlights this difference between a reservation with a modifying effect that has been accepted and one that is the subject of a simple objection. As is the case with paragraph 2, paragraph 3 must be read in conjunction with paragraph 1 of the guideline, which it is designed to clarify.

(43) Paragraph 4, the final paragraph of the guideline, sets out a common-sense rule that can be deduced *a contrario* from the three preceding paragraphs, namely that the interaction of a reservation and an objection leaves intact all the rights and obligations arising under the provisions of the treaty, apart from those that are the subject of the reservation. Yet this principle must be understood as being subject to the special case of what are sometimes called objections "with intermediate effect", which are dealt with in guideline 4.3.7.

4.3.7 Effect of an objection on provisions other than those to which the reservation relates

1. A provision of the treaty to which the reservation does not relate, but which has a sufficient link with the provisions to which the reservation does relate, is not applicable in the treaty relations between the author of the reservation and the author of an objection formulated in accordance with guideline 3.4.2.

2. The reserving State or international organization may, within a period of twelve months following the notification of an objection which has the effect referred to in paragraph 1, oppose the entry into force of the treaty between itself and the objecting State or organization. In the absence of such opposition, the treaty shall apply between the author of the reservation and the author of the objection to the extent provided by the reservation and the objection.

[2297] P.-H. Imbert, footnote 25 above, p. 157 quoting Jacques Dehaussy.

[2298] Karl Zemanek, footnote 1915 above, p. 332. See also A. Pellet and D. Müller, footnote 1048 above, p. 53.

[2299] Examples of modifying reservations can be found at paragraphs 22 and 23 of the commentary to guideline 4.2.4.

Commentary

(1) According to guideline 3.4.2 (Permissibility of an objection to a reservation),

> An objection to a reservation by which a State or an international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty to which the reservation does not relate is only permissible if:
>
> (1) The provisions thus excluded have a sufficient link with the provisions to which the reservation relates; and
>
> (2) The objection would not defeat the object and purpose of the treaty in the relations between the author of the reservation and the author of the objection.

(2) Such objections, while they do not go so far as to preclude the entry into force of the treaty as a whole as between the author of the objection and the author of the reservation (objections with maximum effect),[2300] are nevertheless intended to produce effects that go further than those provided for in article 21, paragraph 3, of the Vienna Conventions, which is reproduced and amplified in guideline 4.3.6; such objections are often referred to as objections "with intermediate effect".[2301]

(3) The purpose of guideline 4.3.7 is not to set out the conditions for the permissibility of such reservations — that is the purpose of guideline 3.4.2 — but to determine what effects they may produce. To what extent can the author of an objection have that objection produce an effect that is intermediate between a "simple" effect (article 21, paragraph 3, of the Vienna Conventions) and a "qualified" or "maximum" effect, which excludes the entry into force of the treaty as a whole in the relations between the author of the reservation and the author of the objection (article 20, paragraph 4 (b), of the Vienna Conventions)?

(4) Clearly, the choice cannot be left entirely to the discretion of the author of the objection.[2302] As the International Court of Justice emphasized in its 1951 opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*:

> "It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and in its application."[2303]

(5) Thus an objection cannot under any circumstances exclude from the treaty relations between the objecting State or international organization and the author of the reservation provisions of the treaty that are essential for the realization of its object and purpose. This clearly constitutes a limit not to be exceeded, and guideline 3.4.2 makes it a criterion for the assessment of permissibility.[2304]

(6) On the other hand, it is important not to lose sight of the principle of mutuality of consent, which is the basis for the law of treaties as a whole and which, as the Court of Arbitration rightly stressed in the Anglo-French *Delimitation of the Continental Shelf* case,[2305] is essential for determining the effects of an objection and of a reservation. As is recalled many times in the commentaries to various guidelines in the Guide to Practice: "No

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[2300] See guideline 4.3.5.

[2301] See paragraph (1) of the commentary to guideline 3.4.2.

[2302] See paragraph (8) of the commentary to guideline 3.4.2.

[2303] *I.C.J. Reports 1951*, footnote 604 above, p. 27.

[2304] See paragraph (1) above.

[2305] Decision of 30 June 1977, cited in footnote 2264 above, p. 42, para. 61.

State can be bound by contractual obligations it does not consider suitable".[2306] This is true for both the reserving State (or international organization) and the objecting State (or international organization). However, in some situations, the effects attributed to objections by article 21, paragraph 3, of the Vienna Conventions may prove unsuited for the re-establishment of mutual consent between the author of the reservation and the author of the objection, even when the object and purpose of the treaty are not threatened by the reservation.

(7) This is the case, for example, when the reservation purports to exclude or modify a provision of the treaty which, according to the intention of the parties, is necessary to safeguard the balance between the rights and obligations resulting from their consent to the entry into force of the treaty. This happens when the reservation not only challenges the consent of the parties to the provision to which the reservation directly refers, but also upsets the balance achieved during negotiations on a set of connected provisions. A contracting State or contracting organization may in this case legitimately consider that being bound by one of the provisions in question without being able to benefit from one or more of the others constitutes "a contractual obligation it does not consider suitable".

(8) These are the types of situations that objections with intermediate effect are meant to address. The practice has been resorted to mainly, if not exclusively, in the case of reservations and objections to the provisions of Part V of the 1969 Vienna Convention, and the example makes it clear why authors of objections seek to expand the effects they intend their objections to produce.

(9) Article 66 of the Vienna Convention and the annex thereto relating to compulsory conciliation provide procedural guarantees which many States, at the time the Convention was adopted, considered essential in order to prevent abuse of certain provisions of Part V.[2307] The reaction of several States to reservations to article 66 of the 1969 Vienna Convention was aimed at safeguarding the package deal, which some States had sought to undermine through reservations and which could only be restored through an objection that went beyond the "normal" effects of the reservations envisaged by the Vienna Conventions.[2308]

(10) Hence in order to restore what could be referred to as the "consensual balance" between the author of the reservation and the author of the objection, the effect of the objection on treaty relations between the two parties should be allowed to extend to provisions of the treaty that have a sufficient link with the provisions to which the reservation refers.

(11) It was in the light of these remarks that the Commission included in the Guide to Practice paragraph 1 of guideline 4.3.7, specifying that an objection may exclude the application of provisions to which the reservation does not relate under the conditions set out in guideline 3.4.2. The latter is mentioned expressly so that there can be no doubt whatsoever that this effect can only be produced if the conditions for the permissibility of objections with intermediate effect set out in that guideline are met. To the extent possible, the wording of paragraph 1 of guideline 4.3.7 has been aligned with that of guideline 3.4.2.

[2306] C. Tomuschat, footnote 1084 above, p. 466; see also the second report on reservations to treaties (A/CN.4/477/Add.1), *Yearbook ... 1996*, vol. II (Part One), p. 57, paras. 97 and 99; and D. Müller "Article 20 (1969)" footnote 1087 above, pp. 809–811, paras. 20–24; and 1969 Vienna Convention Article 20, footnote 1087 above, pp. 496–498, paras. 18–22.

[2307] See paragraphs (9) and (10) of the commentary to guideline 3.4.2.

[2308] D. Müller, "Article 21 (1969)", footnote 49 above, pp. 927 and 928, para. 70; and 1969 Vienna Convention Article 21, footnote 49 above, p. 561, para. 57.

(12) While conceding that objections with intermediate effect may produce the effects intended by their authors under the strict conditions set out in guideline 3.4.2, the Commission is aware of the risks they could pose for the overall treaty balance, and it believes that they should continue to constitute exceptions.

(13) Paragraph 2 of guideline 4.3.7 partially addresses this concern and seeks to maintain the principle of mutual consent to the greatest extent possible. The paragraph proceeds from the principle that objections with intermediate effect constitute in some respects "counter-reservations",[2309] and it provides the author of the reservation with an opportunity to prevent such an effect from being produced by opposing the entry into force of the treaty between itself and the author of the objection.

(14) It seemed reasonable, in the form of progressive development, to set a time period of 12 months for such a reaction, by analogy with the time period available to contracting States and contracting organizations for the expression of their intention not to be bound by the treaty in respect of the author of the reservation.[2310]

(15) The second sentence of paragraph 2 of guideline 4.3.7 draws the consequence of the absence of such opposition within the stipulated time period by transposing the rule applicable to objections with "minimum" effect established in article 21, paragraph 3, of the Vienna Conventions and reproduced in guideline 4.3. The phrase "to the extent provided by the reservation and the objection" is a succinct way of saying that if all these conditions are met, the treaty shall apply as between the author of the reservation and the author of the objection with the exception of those provisions excluded or modified by the reservation and those additional provisions excluded by the objection.

4.3.8 Right of the author of a valid reservation not to comply with the treaty without the benefit of its reservation

The author of a valid reservation is not required to comply with the provisions of the treaty without the benefit of its reservation.

Commentary

(1) The question of objections with "super-maximum" effect whereby the author of the objection affirms that the treaty enters into force in its relations with the author of the reservation without the latter being able to benefit from its reservation,[2311] which is much more controversial than that of reservations with intermediate effect, can also be resolved logically by applying the principle of mutual consent.[2312]

(2) It should be noted, however, that the practice of objections with super-maximum effect has developed not within the context of objections to valid reservations, but in reaction to reservations that are held to be incompatible with the object and purpose of a treaty. A recent example is afforded by the Swedish objection to the reservation formulated by El Salvador to the Convention on the Rights of Persons with Disabilities of 2006:

[2309] See paragraph (7) of the commentary to guideline 3.4.2.

[2310] See article 20, paragraph 5, of the Vienna Conventions and also guideline 2.6.12 (time period for formulating an objection).

[2311] See paragraph (17) of the commentary to guideline 3.4.2.

[2312] See paragraph (5) of the commentary to guideline 4.3.7.

> "... the Government of Sweden has examined the reservation made by the Government of the Republic of El Salvador upon ratifying the Convention on the Rights of Persons with Disabilities.
>
> "According to international customary law, as codified in the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of all States that treaties to which they have chosen to become parties, are respected as to their object and purpose by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.
>
> "The Government of Sweden notes that El Salvador in its reservation gives precedence to its Constitution over the Convention. The Government of Sweden is of the view that such a reservation, which does not clearly specify the extent of the derogation, raises serious doubt as to the commitment of El Salvador to the object and purpose of the Convention.
>
> "The Government of Sweden therefore objects to the aforesaid reservation made by the Government of the Republic of El Salvador to the Convention on the Rights of Persons with Disabilities and considers the reservation null and void. This objection shall not preclude the entry into force of the Convention between El Salvador and Sweden. The Convention enters into force in its entirety between El Salvador and Sweden, without El Salvador benefiting from its reservation."[2313]

(3) Regardless of the consequences of such an objection with a purported super-maximum effect in the case of an invalid reservation,[2314] it is clear that such an effect of an objection is not only not provided for in the Vienna Conventions — which is also true of an objection with intermediate effect — but is also clearly incompatible with the principle of mutual consent. Accordingly, "super-maximum" effect is excluded in the case of a valid reservation: the author of an objection cannot force the author of the reservation to be bound by more than what it is prepared to accept. The objecting State or international organization cannot impose on a reserving State or international organization that has validly exercised its right to formulate a reservation any obligations which the latter has not expressly agreed to assume. This idea is expressed in guideline 4.3.8.

(4) The author of a reservation that meets the criteria for permissibility and has been formulated in accordance with the prescribed form and procedure cannot be required to comply with the provisions of the treaty without the benefit of its reservation.

(5) This does not mean, however, that an objection with super-maximum effect has no effect on the content of treaty relations between its author and the author of the reservation. As is the case with reservations with intermediate effect that go beyond admissible effects, such unilateral declarations are objections through which the author expresses its disagreement with the reservation. The application of the rules set out in guideline 4.3.6 (Effect of an objection on treaty relations) is not limited to simple objections. Those rules apply to all objections to a valid reservation, including objections with super-maximum effect.

[2313] *Multilateral Treaties* ..., chap. IV.15.

[2314] See guidelines 4.5.2 and 4.5.3.

4.4 Effect of a reservation on rights and obligations independent of the treaty

4.4.1 Absence of effect on rights and obligations under other treaties

A reservation, acceptance of a reservation or objection to a reservation neither modifies nor excludes any rights and obligations of their authors under other treaties to which they are parties.

Commentary

(1) The definition of a reservation contained in article 2, paragraph 1 (d), of the Vienna Conventions and reproduced in guideline 1.1 clearly establishes that a reservation "purports to exclude or to modify the legal effect of certain provisions *of the treaty or of the treaty as a whole with respect to certain specific aspects*". Likewise, article 21, paragraph 1, provides that an established reservation can only modify (or exclude) the "provisions *of the treaty* to which the reservation relates".[2315] Although article 21, paragraph 3, and guideline 4.2.4 are not as precise on this point, they refer to the "provisions to which the reservation relates", which, based on the definition of a reservation, can only mean "certain provisions *of the treaty*".

(2) The text of the Vienna Conventions therefore leaves no room for doubt: a reservation can only modify or exclude the legal effects *of the treaty* or some of its provisions. A reservation remains a unilateral statement linked to a treaty, the legal effects of which it purports to modify. It does not constitute an independent unilateral act capable of modifying the obligations, or even the rights, of its author. Furthermore, the combined effect of a reservation and an objection cannot exclude the application of rules external to the treaty.

(3) Although technically they do not apply to a reservation to a treaty, the arguments put forward by the French Republic with regard to its reservation to its declaration of acceptance of the jurisdiction of the International Court of Justice under article 36, paragraph 2, of the Statute of the Court during the *Nuclear Tests* cases are quite instructive in this regard.[2316] In order to establish that the Court had no jurisdiction in those cases, France contended that the reservation generally limited its consent to the jurisdiction of the Court, particularly the consent given in the General Act of 1928. In their joint dissenting opinion, several judges of the Court rejected the French thesis:

> "Thus, in principle, a reservation relates exclusively to a State's expression of consent to be bound by a particular treaty or instrument and to the obligations assumed by that expression of consent. Consequently, the notion that a reservation attached to one international agreement, by some unspecified process, is to be superimposed upon, or transferred to another international instrument is alien to the very concept of a reservation in international law; and also cuts across the rules governing the notification, acceptance and rejection of reservations."[2317]

[2315] On the differences between article 2, paragraph 1 (d), and article 21, paragraph 1, of the Vienna Conventions, see D. Müller, "Article 21 (1969)", footnote 49 above, pp. 896–898, paras. 25 and 26; and 1969 Vienna Convention Article 21, footnote 49 above, pp. 546–547, paras. 25–26.

[2316] *Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, pp. 101 and 102, para. 18; *Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, pp. 137 and 138, para. 16.

[2317] *Nuclear Tests (Australia v. France)*, Joint dissenting opinion of Justices Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, *I.C.J. Reports 1974*, p. 350, para. 83.

(4) This opinion is expressed in sufficiently broad terms not to be applicable solely to the specific situation of reservations to declarations of acceptance of the compulsory jurisdiction of the Court under the optional clause but, more generally, to any reservation to an international treaty. This approach was later endorsed by the Court itself in the *Border and Transborder Armed Actions (Nicaragua v. Honduras)* case, in which Honduras sought to have its reservation to its declaration of acceptance of the compulsory jurisdiction of the Court under the optional clause take precedence over its obligations by virtue of article XXXI of the Pact of Bogotá. The Court, however, held that such a reservation could not in any event restrict the commitment which Honduras had undertaken by virtue of article XXXI. The Honduran argument as to the effect of the reservation to its 1986 declaration on its commitment under article XXXI of the Pact could not therefore be accepted.[2318]

(5) This relative effect of the reservation and of reactions to the reservation, in the sense that they can modify or exclude only the legal effects of the treaty in regard to which they were formulated and made, results from the principle *pacta sunt servanda*. A State or international organization cannot release itself through a reservation, acceptance of a reservation or objection to a reservation from obligations it has elsewhere.

(6) Guideline 4.4.1 highlights the absence of effect of a reservation, or acceptance of or objection to it, on treaty obligations under another treaty. Only the legal effects of treaty provisions to which the reservation relates can be modified or excluded.

(7) The strong wording employed in this guideline does not exclude the possibility that a reservation to a particular treaty as well as the reactions to it may come to play a certain role in the interpretation of other treaties by analogy or by means of *a contrario* reasoning. However, such considerations lie outside the scope of guideline 4.4.1, which merely recalls that such instruments can neither *modify* nor *exclude* the rights and obligations emanating from another treaty: even if the reservations, acceptances or objections of which they are the object can play a role in interpretation, they cannot have modifying or excluding effects.

4.4.2 Absence of effect on rights and obligations under customary international law

A reservation to a treaty provision which reflects a rule of customary international law does not of itself affect the rights and obligations under that rule, which shall continue to apply as such between the reserving State or organization and other States or international organizations which are bound by that rule.

Commentary

(1) Just as a reservation cannot influence pre-existing treaty relations of its author, it cannot have an impact on other obligations, of any nature, binding on the author of the reservation apart from the treaty. This is especially clear with regard to a reservation to a provision reflecting[2319] a rule of customary international law.

(2) Adopted within the framework of Part 3 of the Guide to Practice on the permissibility of reservations, guideline 3.1.5.3 addresses the issue as follows:

> 3.1.5.3 Reservations to a provision reflecting a customary norm

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[2318] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility*, Judgment, *I.C.J. Reports 1988*, p. 88, para. 41.

[2319] On the use of the word "reflect", see paragraph (1) of the commentary to guideline 3.1.5.3.

> The fact that a treaty provision reflects a rule of customary international law does not in itself constitute an obstacle to the formulation of a reservation to that provision.

(3) It follows that the customary nature of the rule reflected in a treaty provision does not in itself constitute an obstacle to the formulation of a reservation,[2320] but that such a reservation can in no way call into question the binding nature of the rule concerned in relations between the reserving State or international organization and other States or international organizations, whether or not they are parties to the treaty.

(4) Nevertheless, the customary nature of a provision which is the object of a reservation has important consequences with respect to the effects produced by the reservation; once the reservation is established, it prevents application of the treaty rule which is the object of the reservation in the reserving State's relations with the other parties to the treaty, but it does not eliminate that State's obligation to respect the customary rule (the content of which may be identical).[2321]

(5) Certainly, as between the author of the reservation and the contracting States or contracting organizations with regard to which the reservation is established, the reservation has the "normal" effect provided for in article 21, paragraph 1, creating between those parties a specific regulatory system which may derogate from the customary rule concerned in the *context of the treaty*[2322] – for example, by imposing less stringent obligations with regard to notification or dispute settlement. Nevertheless, the reservation in itself in no way affects the obligatory nature of the customary rule as such. It cannot release its author from compliance with the customary rule, if it is in force with regard to the author, independently of the treaty.[2323] The International Court of Justice has clearly stressed in this regard that:

> "[n]o reservation could release the reserving party from obligations of general maritime law existing outside and independently of the Convention."[2324]

The reason for this is simple:

[2320] See guideline 3.1.5.3 and commentary.

[2321] In support of this position, see R. Jennings and A. Watts, *Oppenheim's International Law*, footnote 210 above, p. 1244; G. Teboul, footnote 1583 above, p. 711; and Prosper Weil, "Vers une normativité relative en droit international?", *RGDIP*, vol. 86 (1982), pp. 43–44. See also the authors cited in footnote 1690 above or W.A. Schabas, footnote 969 above, p. 56. Paul Reuter takes the opposing view: "... *entre l'État qui formule la réserve et les parties qui s'abstiennent de présenter une objection, la règle coutumière cesse de s'appliquer puisque par un mécanisme conventionnel postérieur à l'établissement de la règle coutumière son application a été suspendue*" [the customary rule no longer applies between the State that formulates a reservation and the parties that refrain from objecting to it since, through a treaty mechanism subsequent to the establishment of the customary rule, its application has been suspended] (footnote 405 above, pp. 630–631) (or *Le développement de l'ordre juridique international*, *ibid.*, p. 370); for a similar argument, see G. Teboul, footnote 1583 above, pp. 690 and 708.

[2322] *Ibid.*, p. 708, para. 32.

[2323] Prosper Weil has stated that "*[p]eu importe désormais la volonté manifestée par un État vis-à-vis d'une convention donnée: (...) qu'il fasse des réserves à certaines de ses clauses ou non (...), il sera de toute manière lié par celles des dispositions de cette convention auxquelles aura été reconnu le caractère de règles de droit international coutumier ou général*" [the will demonstrated by a State in regard to a particular convention is now of little significance … whether or not it makes reservations to some of its clauses … it will in any case be bound by those provisions of the convention which have been recognized as having the character of rules of customary or general international law] (footnote 2421 above, 1982, pp. 43–44).

[2324] *North Sea Continental Shelf*, Judgment, *I.C.J. Reports 1969*, p. 40, para. 65.

> "The fact that the above-mentioned principles [of customary and general international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions."[2325]

(6) In his dissenting opinion appended to the 1969 judgment of the International Court of Justice in the *North Sea Continental Shelf* cases, *ad hoc* Judge Sørensen summarized the rules applicable to reservations to a provision declaratory of customary law as follows:

> "... the faculty of making reservations to a treaty provision has no necessary connection with the question whether or not the provision can be considered as expressing a generally recognized rule of law. To substantiate this opinion it may be sufficient to point out that a number of reservations have been made to provisions of the Convention on the High Seas, although this Convention, according to its preamble, 'generally declaratory of established principles of international law'. Some of these reservations have been objected to by other contracting States, while other reservations have been tacitly accepted. The acceptance, whether tacit or express, of a reservation made by a contracting party does not have the effect of depriving the Convention as a whole, or the relevant article in particular, of its declaratory character. It only has the effect of establishing a special contractual relationship between the parties concerned within the general framework of the customary law embodied in the Convention. Provided the customary rule does not belong to the category of *jus cogens*, a special contractual relationship of this nature is not invalid as such. Consequently, there is no incompatibility between the faculty of making reservations to certain articles of the Convention on the Continental Shelf and the recognition of that Convention or the particular articles as an expression of generally accepted rules of international law."[2326]

(7) Concretely, the effect of the reservation (and of the reactions to it – acceptance or objection) is to exclude application of the *treaty* rule that reflects a customary rule, which means that the author of the reservation is not bound *vis-à-vis* the other contracting States or contracting organizations to comply with the (treaty) rule within the framework of the treaty. For example, it is not required to have recourse to arbitration or an international court for any matter of interpretation or application of the rule, notwithstanding a dispute settlement clause contained in the treaty. Nevertheless, since the customary rule retains its full legal force, the reservation does not exempt its author from the obligation to respect the customary rule (by definition identical). Compliance or the consequences of non-compliance with the customary rule are not part of the legal regime created by the treaty but are covered by general international law and evolve along with it.

(8) This view of the matter, moreover, is shared by States, which do not hesitate to draw the attention of the author of a reservation concerning a treaty provision reflecting a customary rule to the fact that the rule remains in force in their mutual relations their objection notwithstanding. See, for example the objection of the Netherlands to several reservations to article 11, paragraph 1, of the Vienna Convention on Diplomatic Relations:

> "The Kingdom of the Netherlands does not accept the declarations by the People's Republic of Bulgaria, the German Democratic Republic, the Mongolian People's

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[2325] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction of the Court and Admissibility of the Application*, Judgment of 26 November 1984, *I.C.J Reports 1984*, p. 424, para. 73.

[2326] *I.C.J. Reports 1969*, p. 248.

> Republic, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic and the People's Democratic Republic of Yemen concerning article 11, paragraph 1, of the Convention. The Kingdom of the Netherlands takes the view that this provision remains in force in relations between it and the said States in accordance with international customary law."[2327]

(9) Thus the United States of America rightly considered, in its objection to the Syrian Arab Republic's reservation to the Convention on the Law of Treaties, that:

> "the absence of treaty relations between the United States of America and the Syrian Arab Republic with regard to certain provisions in Part V will not in any way impair the duty of the latter to fulfil any obligation embodied in those provisions to which it is subject under international law independently of the Vienna Convention on the Law of Treaties".[2328]

4.4.3 Absence of effect on a peremptory norm of general international law (*jus cogens*)

1. A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such between the reserving State or organization and other States or international organizations.

2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.

Commentary

(1) The consequence of guidelines 4.4.1 and 4.4.2 is that a reservation and the reactions that it elicits neither modify nor exclude the application of other treaty or customary rules that bind the parties. This principle applies *a fortiori*, of course, when the treaty rule reflects a peremptory norm of general international law (*jus cogens*).

(2) As indicated in the commentary to guideline 3.1.5.3 (Reservations to a provision reflecting a customary rule), the reasoning developed with regard to reservations to provisions reflecting customary rules is applicable *mutatis mutandis* to reservations to provisions reflecting peremptory norms.[2329] The purpose of guideline 4.4.3 is to make it clear that a reservation which has just been formulated to a treaty provision reflecting a peremptory norm of general international law shall not have any effect on the application of that norm.

(3) Given the similarity of the problems applicable to reservations to a provision reflecting a "simple" customary rule, on the one hand, and to a provision reflecting a peremptory norm, on the other hand, guideline 4.4.3 is worded similarly to guideline 4.4.2. However, in order not to give the impression that some States might not be bound by the peremptory norm of international law in question, which *ex hypothesi* is applicable to all States and international

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[2327] *Multilateral Treaties ...*, chap. III.3. In essence, the validity of the remark by the Netherlands is not in doubt; however, the way it is framed is highly debatable: it is not the treaty *provision* that remains in force between the reserving States and the Netherlands, but the customary rule that the provision reflects.

[2328] *Multilateral Treaties ...*, chap. XXIII.1; see also the objections of the Netherlands, cited in paragraph (8) above.

[2329] See paragraphs (16) to (22) of the commentary to guideline 3.1.5.3.

organizations,[2330] the phrase "which are bound by that rule", which appears at the end of guideline 4.4.2, was omitted. In addition, the Commission saw no reason to include the words "of itself"[2331] in guideline 4.4.3: doubtless the rules of *jus cogens* will continue to evolve,[2332] but it seems unlikely that a reservation can contribute to destabilizing a norm presenting such a degree of binding force.

(4) Paragraph 2 of guideline 4.4.3, which borrows wording from the definition of reservations, expresses the idea that a reservation cannot in any way exclude or modify the legal effect of a treaty in a manner contrary to *jus cogens*. For the sake of conciseness, it did not seem necessary to reproduce the text of guideline 1.1 in full, but the phrase "exclude or modify the legal effect of a treaty" must be understood as meaning to exclude or modify both the "legal effect of certain provisions of the treaty" and "the legal effect … of the treaty as a whole with respect to certain aspects" in their application to the State or to the international organization which formulates the reservation.

(5) Guideline 4.4.3 also covers the case in which, although no rule of *jus cogens* is reflected in the treaty, a reservation would entail the treaty being applied in a manner conflicting with *jus cogens*. It is conceivable, for instance, that a reservation could be intended to exclude a category of persons from benefiting from certain rights granted under a treaty, on the basis of a form of discrimination that would be contrary to *jus cogens*; the reservation in question could produce such an effect.

4.5 Consequences of an invalid reservation

Commentary

(1) Neither the 1969 nor the 1986 Vienna Convention deals explicitly with the question of the legal effects of a reservation that does not meet the conditions of permissibility and formal validity established in articles 19 and 23, which, taken together, allow the reservation to be considered established in respect of another contracting State or another contracting organization as soon as that State or organization has accepted it in accordance with the provisions of article 20.[2333] The *travaux préparatoires* on the provisions of these two Conventions that concern reservations are equally unrevealing as to the effects — or absence of effects — that result from the invalidity of a reservation.

(2) The effects attributed to a non-established reservation by the Commission's early Special Rapporteurs arose implicitly from their adherence to the traditional system of unanimity: the author of such a reservation could not claim to have become a party to the treaty. Moreover, it was not a question of determining the effects of a reservation that did not fulfil certain conditions of validity, since such conditions were of little relevance under the wholly intersubjective system,[2334] but rather of determining the effects of a reservation which had not been accepted by all the other contracting States and which, for that reason, did not become "part of the bargain between the parties".[2335]

[2330] Subject to the possible existence of regional peremptory norms, which the Commission did not address.

[2331] See paragraph (8) of the commentary to guideline 4.4.2 above.

[2332] *Cf.* article 64 of the Vienna Conventions (Emergence of a new peremptory norm of international law (*jus cogens*)).

[2333] See guideline 4.1 (Establishment of a reservation with regard to another State or organization).

[2334] See, however, paragraph (4) below.

[2335] J.L. Brierly, report on the law of treaties (A/CN.4/23), *Yearbook … 1950*, vol. II, para. 96. See also *ibid.*, vol. I, 53rd meeting, 23 June 1953, para. 3 (Brierly).

(3) From this perspective, Brierly wrote in 1950 that "the acceptance of a treaty subject to a reservation is ineffective unless or until every State or international organization whose consent is requisite to the effectiveness of that reservation has consented thereto".[2336] H. Lauterpacht expressed the same idea: "A signature, ratification, accession, or any other method of accepting a multilateral treaty is void if accompanied by a reservation or reservations not agreed to by all other parties to the treaty."[2337] Thus, unless a reservation is established in this manner, it produces no effect and nullifies the consent to be bound by the treaty. The League of Nations Committee of Experts for the Progressive Codification of International Law had already stressed that a "null and void" reservation had no effect:

> "In order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void."[2338]

Under this system, the issue is the ineffectiveness, rather than the invalidity, of a reservation; consent alone establishes its acceptability or unacceptability to all the other contracting States and contracting organizations.

(4) However, even Brierly, though a strong advocate of the system of unanimity, was aware that there might be reservations which, by their very nature or as a result of the treaty to which they referred, might *ipso jure* have no potential effect. In the light of treaty practice, he considered that some treaty provisions "allow only certain reservations specified in the text, and prohibit all others; these do not bear on the position of a depositary or the question of States being consulted in regard to reservations, for *such questions cannot arise as no reservations at that stage are permissible*".[2339] It followed that States were not free to "agree upon any terms in the treaty",[2340] as he had maintained the previous year; there were indeed reservations that could not be accepted because they were prohibited by the treaty itself. Fitzmaurice endorsed this idea in his draft article 37, paragraph 3, which stated:

> "In those cases where the treaty itself permits certain specific reservations, or a class of reservations, to be made, there is a presumption that any other reservations are excluded and cannot be accepted."[2341]

(5) The situation changed with Sir Humphrey Waldock's first report. The fourth Special Rapporteur on the law of treaties, a convert to the flexible system, expressly made the sovereign right of States to formulate reservations subject to certain conditions of permissibility. Despite some uncertainty concerning his position on the permissibility of

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[2336] Draft article 10, para. 3, in his report on the law of treaties (A/CN.4/23), *Yearbook ... 1950*, vol. II, p. 224.

[2337] Draft article 9 in Lauterpacht, report on the law of treaties (A/CN.4/63), *Yearbook ... 1953*, vol. II, p. 91.

[2338] League of Nations, *Official Journal*, eighth year, No. 7, p. 880.

[2339] Report on reservations to multilateral conventions (A/CN.4/41), *Yearbook ... 1951*, vol. II, p. 3, para. 11 (emphasis added). In annex C to his report, the Special Rapporteur provided examples from the Convention providing a Uniform Law for Bills of Exchange and Promissory Notes (1930), the Convention providing a Uniform Law for Cheques (1931) and the 1948 Protocol amending the International Convention on Economic Statistics, signed at Geneva on 14 December 1928.

[2340] Brierly, report on the law of treaties (A/CN.4/23), *Yearbook ... 1950*, vol. II, p. 239, para. 88.

[2341] Brierly, report on the law of treaties (A/CN.4/101), *Yearbook ... 1956*, vol. II, p. 115.

reservations incompatible with the object and purpose of the treaty,[2342] draft article 17, paragraph 1, as proposed in his first report, "accepts the view that, *unless the treaty itself, either expressly or by clear implication, forbids or restricts the making of reservations*, a State is free, in virtue of its sovereignty, to formulate such reservations as it thinks fit".[2343] However, Sir Humphrey did not deem it appropriate to specify the effects arising from the formulation of a prohibited reservation; in other words, he set the criteria for the permissibility of reservations without establishing the regime governing reservations which did not meet them.[2344]

(6) Waldock's first report does, however, contain several clues as to the effects of a reservation that is prohibited by the treaty: "when a reservation is formulated which is not prohibited by the treaty, the other States are called upon to indicate whether they accept or reject it but, when the reservation is one prohibited by the treaty, they have no need to do so, for they have already expressed their objection to it in the treaty itself."[2345] While this explanation does not directly address the question of the effect of prohibited reservations, it has the merit of suggesting that they are excluded from the scope of the provisions concerning the consent of the contracting States and, subsequently, of all the provisions concerning the effects of reservations with the exception of the potential validation of an otherwise inadmissible reservation through the unanimous consent of all the contracting States.[2346]

(7) For a long time, the Commission gave separate — and rather confusing — treatment to the question of reservations incompatible with the object and purpose of the treaty and that of prohibited reservations. Thus, paragraph 2 (b) of draft article 20 (Effects of reservations), adopted by the Commission on first reading, envisaged the legal effect of a reservation only in the context of an objection to it made on the grounds of its incompatibility with the object and purpose of the treaty:

> "An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between

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[2342] First report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, pp. 65–66, para. (10) of the commentary to draft article 17. See also paragraphs (2) and (3) of the commentary to guideline 3.1 (Permissible reservations).

[2343] First report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 65, paragraph (9) of the commentary to draft article 17 (emphasis in the original). See also *ibid.*, p. 67, paragraph (15) of the commentary to draft article 18. See also the Commission's debate, *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 143, para. 64 (Yasseen) and the summing up of the Special Rapporteur, *ibid.*, 653rd meeting, 29 May 1962, p. 159, para. 57 (Waldock).

[2344] During the debate, Verdross expressed the view that the case of a "treaty which specifically prohibited reservations ... did not present any difficulties" (*ibid.*, 652nd meeting, 28 May 1962, p. 148, para. 33), without, however, taking a clear position regarding the effects of the violation of such a specific prohibition. The members of the Commission were, however, aware that the problem could arise, as seen from the debate on draft article 27 on the functions of a depositary (*ibid.*, 658th meeting, 6 June 1962, p. 191, para. 59 (Waldock); and *ibid.*, 664th meeting, 19 June 1962, p. 236, paras. 82–95.

[2345] *Ibid.*, vol. II, p. 65, para. (9) of the commentary to draft article 17. In that connection, see Brierly, report on the law of treaties (A/CN.4/23), *Yearbook ... 1950*, vol. II, p. 239, para. 88.

[2346] Draft article 17, para. 1 (b), first report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 60: "The formulation of a reservation, the making of which is expressly prohibited or impliedly excluded under any of the provisions of subparagraph (a), is inadmissible unless the prior consent of all the other interested States has been first obtained." See also draft article 18 as proposed by Waldock in his fourth report on the law of treaties (A/CN.4/177 and Add.1 and 2), *Yearbook ... 1965*, vol. II, p. 50. On the question of the unanimous consent of the contracting States and contracting organizations, see guideline 3.3.3 above and commentary, in particular paragraph (9).

the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State."[2347]

(8) It is also clear from this formula that an objection — which was (at that time) also subject to the requirement that it must be compatible with the object and purpose of the treaty, in accordance with the advisory opinion of the International Court of Justice[2348] — was envisaged only in the case of reservations incompatible (or deemed incompatible) with the object and purpose of the treaty. In 1965, however, in response to several States' criticism of this restriction of the right to make objections to reservations, the Special Rapporteur proposed new wording[2349] in order to make clearer the dissociation of objections from the permissibility of reservations. However, as a result, the question of impermissible reservations was set aside in the work of the Commission and the Conference. The Vienna Convention does not mention this question.

(9) The absence of rules on invalid reservations in the 1969 Vienna Convention is, moreover, a consequence of the wording of article 21, paragraph 1, on the effect of acceptance of a reservation: only reservations that are permissible under the conditions established in article 19, formulated in accordance with the provisions of article 23 and accepted by another contracting State or contracting organization in accordance with article 20[2350] can be considered established under the terms of this provision. Clearly, a reservation that is not valid does not meet these cumulative conditions, even if it has been accepted by one or more contracting States or organizations.

(10) This clarification is not, however, repeated in article 21, paragraph 3, on objections to reservations. But it does not follow that the Convention determines the legal effects of an invalid reservation to which an objection has been made: under article 20, paragraph 4 (c), in order for such an objection to produce the effect envisaged in article 21, paragraph 3, at least one acceptance is required;[2351] however, the effects of acceptance of an invalid reservation are not governed by the Convention.

(11) The *travaux* of the Vienna Conference clearly confirm that the 1969 Convention says nothing about the consequences of invalid reservations, still less their effects. In 1968, during

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[2347] *Yearbook ... 1962*, vol. II, p. 176.

[2348] In 1951, the Court stated: "it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation" (*I.C.J. Reports 1951*, footnote 604 above, p. 24). For a thorough analysis of the differences between the legal system adopted by the Commission and the Court's 1951 advisory opinion, see J.K. Koh, footnote 1447 above, pp. 88–95.

[2349] Sir Humphrey Waldock, fourth report on the law of treaties (A/CN.4/177 and Add.1 and 2), *Yearbook ... 1965*, vol. II, p. 52, para. (9) of the commentary to draft article 19. Draft article 19, paragraph 4, as proposed by Waldock, states:

> "4. In other cases, unless the State [*sic* – read 'the treaty'?] concerned otherwise specifies:
>
> (a) acceptance of a reservation by any party constitutes the reserving State a party to the treaty in relation to such party;
>
> (b) objection to a reservation by any party precludes the entry into force of the treaty as between the objecting and the reserving State."

[2350] See guideline 4.1 above (Establishment of a reservation with regard to another State or another organization) and commentary.

[2351] See paragraphs (2) and (3) of the commentary to guideline 4.3.3.

the first session of the Conference, the United States of America proposed to add, in the chapeau of future article 20, paragraph 4, after "[i]n cases not falling under the preceding paragraphs", the following specification: "and unless the reservation is prohibited by virtue of article 16 [future article 19]".[2352] According to the explanation given by Herbert W. Briggs, the United States representative, in support of the amendment:

> "The purpose of the United States amendment to paragraph 4 was to extend the applicability of the prohibited categories of reservations set out in article 16 to the decisions made by States under paragraph 4 of article 17 in accepting or objecting to a proposed reservation. In particular, the proposal would preclude acceptance by another contracting State of a reservation prohibited by the treaty, and the test of incompatibility with the object or purpose of the treaty set out in subparagraph (*c*) of article 16 would then be applicable to such acceptance or objection. It was a shortcoming of subparagraph (*c*) that it laid down a criterion of incompatibility for a prohibited reservation, but failed to make it explicitly applicable to the acceptance or objection to a reservation."[2353]

(12) Although it is unclear from Briggs' explanations, which focused primarily on extending the criteria for the permissibility of a reservation to include acceptances and objections, the effect of the United States amendment would unquestionably have been that the system of acceptances of and objections to reservations established in article 20, paragraph 4, would apply only to reservations that met the criteria for permissibility under article 19. Acceptance of and objection to an impermissible reservation are clearly excluded from the scope of this amendment[2354] even though no new rule concerning such reservations was proposed. The representative of Canada, Max H. Wershof, then asked, "Was paragraph C of the United States amendment (A/CONF.39/C.1/L.127) consistent with the intention of the International Law Commission regarding incompatible reservations?"[2355] Sir Humphrey, in his capacity as Expert Consultant, replied: "The answer was ... Yes, since it would in effect restate the rule already laid down in article 16."[2356]

(13) The "drafting" amendment proposed by the United States was sent to the Drafting Committee.[2357] However, neither the text that was provisionally adopted by the Committee and submitted to the Committee of the Whole on 15 May 1968,[2358] nor the text ultimately adopted by the Committee of the Whole and referred to the plenary Conference,[2359] contained the wording proposed by the United States, although the failure to incorporate it is not explained in the published materials of the Conference. It seems, however, clear that the

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[2352] A/CONF.39/C.1/L.127, reproduced in *Documents of the Conference*, footnote 54 above, p. 136, para. 179 (v) (d).

[2353] *First Session, Summary records*, footnote 35 above, 21st plenary meeting of the Committee of the Whole, 10 April 1968, p. 108, para. 11.

[2354] It is, however, not entirely clear why the same restriction should not apply to the cases covered by paragraph 2 (treaties that must be applied in their entirety) and paragraph 3 (constituent instruments of international organizations).

[2355] *First Session, Summary records*, A/CONF.39.11, footnote 35 above, 24th meeting, 16 April 1968, pp. 132–133, para. 77.

[2356] *Ibid.*, 25th meeting, 16 April 1968, p. 133, para. 4. Draft article 16 became article 19 of the Convention.

[2357] *Ibid.*, pp. 135–136, para. 38.

[2358] A/CONF.39/C.1/L.344, reproduced in *Documents of the Conference*, footnote 54 above, p. 137, para. 185.

[2359] That text was approved by 60 votes to 15, with 13 abstentions. (*Second Session, Summary records*, footnote 332 above, 85th meeting of the Committee of the Whole, 10 April 1969, p. 221, paras. 33–34).

Commission and the Conference considered that the case of impermissible reservations was not the subject of the rules adopted at the conclusion of their work and that the provisions of articles 20 and 21 of the Vienna Convention did not apply to that situation.

(14) During the Commission's work on the question of treaties concluded between States and international organizations or between two or more international organizations and the *travaux* of the 1986 Vienna Conference, the question of the potential effects of a reservation formulated despite the conditions for permissibility in article 19 was not addressed. Nevertheless, Reuter, Special Rapporteur of the Commission on the topic, recognized that "even in the case of treaties between States, the question of reservations has always been a thorny and controversial issue, and even the provisions of the Vienna Convention have not eliminated all these difficulties".[2360] Nonetheless, the Special Rapporteur "thought it wise not to depart from that Convention where the concept of reservations was concerned".[2361]

(15) In its observations on the Human Rights Committee's general comment No. 24, the United Kingdom also recognized, at least in principle,[2362] that the 1969 Vienna Convention did not cover the question of impermissible reservations:

> "The Committee correctly identifies articles 20 and 21 of the Vienna Convention on the Law of Treaties as containing the rules which, taken together, regulate the legal effect of reservations to multilateral treaties. The United Kingdom wonders however whether the Committee is right to assume their applicability to incompatible reservations. The rules cited clearly do apply to reservations which are fully compatible with the object and purpose but remain open for acceptance or objection (...). It is questionable however whether they were intended also to cover reservations which are inadmissible *in limine*."[2363]

(16) Admittedly, neither the 1969 nor the 1986 Vienna Convention — which are largely similar, in this respect as well — contains clear and precise rules concerning the effects of an invalid reservation.[2364] That is, without a doubt, one of the most serious lacunae in the matter of reservations in the Vienna Conventions. It has been referred to as a "normative gap", and the gap is all the more troubling in that the *travaux préparatoires* do not offer any clear indications as to the intentions of the authors of the 1969 Convention, but instead give the impression that they deliberately left the question open. However, what was acceptable in a general treaty on the law of treaties in view of the disputes raised by the question is not

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[2360] Reuter, tenth report on the question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/341 and Add.1), *Yearbook ... 1981*, vol. II (Part One), p. 56, para. 53. The Special Rapporteur referred to P.-H. Imbert, *Les réserves aux traités multilatéraux*, footnote 25 above; and, by the same author, "La question des réserves dans la décision arbitrale du 30 juin 1977", footnote 1544 above, pp. 29–58.

[2361] *Yearbook ... 1977*, vol. I, 1434th meeting, 6 June 1977, p. 98, para. 4 (P. Reuter).

[2362] See footnote 2400 below. While the United Kingdom considered that inadmissible reservations were not covered by the Vienna Conventions, the solution that it proposed was, ultimately, simply to apply the rule laid down in article 21, paragraph 3, of the Conventions to them.

[2363] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), vol. I, p. 133, para. 13.

[2364] In that regard, see G. Gaja, footnote 2274 above, pp. 349–361; B. Simma, "Reservations to human rights treaties: some recent developments", in *Liber Amicorum, Professor Ignaz Seidl-Hohenveldern in Honour of His 80th Birthday* (The Hague, Kluwer, 1998), pp. 667–668; C. Tomuschat, "International law: ensuring the survival of mankind on the eve of a new century", *Recueil des Cours de L'Academie de Droit International de la Haye*, vol. 281 (1999), p. 321 and A. Pellet and D. Müller, "footnote 1623 above, pp. 544–547.

acceptable when the aim is precisely to fill the gaps left by the Vienna Conventions in the matter of reservations.

(17) In this regard, it is particularly striking that "the 1969 Vienna Convention has not frozen the law. Regardless of the fact that it leaves behind many ambiguities, that it contains gaps on sometimes highly important points and that it could not foresee rules applicable to problems that did not arise, or hardly arose, at the time of its preparation (...), the Convention served as a point of departure for new practices that are not, or not fully, followed with any consistency at the present time".[2365] In accordance with the method of work that has been followed by the Commission in the preparation of the Guide to Practice,[2366] it has assumed that the treaty rules — which are silent on the question of the effects of invalid reservations — are established, but has endeavoured to "simply try to fill the gaps and, where possible and desirable, to remove their ambiguities while retaining their versatility and flexibility".[2367]

(18) In so doing, the Commission did not intend to legislate and to establish *ex nihilo* rules concerning the effects of a reservation that does not meet the criteria for validity. State practice, international jurisprudence and doctrine have already developed approaches and solutions on this matter which the Commission considers perfectly suitable for guiding its work. It is a question not of creating but of systematizing the applicable principles and rules in a reasonable manner, while introducing elements of progressive development, and of preserving the general spirit of the Vienna system.

(19) The title of section 4.5 of the Guide to Practice "Consequences of an invalid reservation" was preferred over the one that was initially proposed, "Effects of an invalid reservation"[2368] because the main consequence of these instruments is, precisely, that they are devoid of legal effects.

(20) Furthermore, it should be noted that invalid reservations, the consequences of which are specified in this section of the Guide to Practice, are invalid either because they do not meet the formal and procedural requirements prescribed in Part 2 or because they are deemed impermissible according to the provisions of Part 3. The use of the words "validity/invalidity" and "valid/invalid" is consistent with the broad definition of the expression "validity of reservations" adopted by the Commission in 2006 in order "to describe the intellectual operation consisting in determining whether a unilateral statement made by a State or an international organization and purporting to exclude or modify the legal effect of certain

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[2365] First report on the law and practice relating to reservations to treaties (A/CN.4/470), *Yearbook ... 1995*, vol. II (Part One), p. 152, para. 161.

[2366] In 2006, during the Commission's consideration of the tenth report on reservations to treaties, "[i]t was even questioned whether the Commission should take up the matter of the consequences of the invalidity of reservations, which, perhaps wisely, had not been addressed in the Vienna Conventions. Perhaps that gap should not be filled; the regime that allowed States to decide on the validity of reservations and to draw the consequences already existed, and there was no reason to change it" (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 142). In the Sixth Committee, however, this was said to be a key issue for the study (A/C.6/61/SR.17, para. 5 (France)). Several delegations supported the idea that impermissible reservations were null and void (A/C.6/61/SR.16, para. 43 (Sweden); *ibid.*, para. 51 (Austria); and A/C.6/61/SR.17, para. 7 (France)); it was hoped that the specific consequences arising from that nullity would be spelled out in the Guide to Practice (A/C.6/61/SR.16, para. 59 (Canada)).

[2367] *Yearbook ... 1995*, vol. II (Part One), p. 152, para. 163.

[2368] Fifteenth report on reservations to treaties (A/CN.624/Add.1), para. 419.

provisions of the treaty in their application to that State or organization was capable of producing the effects attached in principle to the formulation of a reservation".[2369]

4.5.1 Nullity of an invalid reservation

A reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of any legal effect.

Commentary

(1) By clearly indicating that a reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void and by formally stating the consequence that it is devoid of effect, guideline 4.5.1 aims to fill one of the major gaps in the Vienna Conventions, which, no doubt deliberately, left this question unanswered,[2370] despite its very great practical importance.

(2) This guideline, which is probably one of the most important provisions in the Guide to Practice, does not duplicate guideline 3.3.1 (Irrelevance of distinction among the grounds for non-permissibility). First of all, it deals with both the formal invalidity and the impermissibility of reservations;[2371] whereas Part 3, in particular the first three sections thereof, concerns only the permissibility of reservations. There is no reason to exclude from the conditions for the validity of a reservation — which, if not met, render the reservation null and void — those which concern form. A reservation which was not formulated in writing,[2372] was not communicated to the other concerned parties[2373] or was formulated late[2374] is also, in principle, unable to produce legal effects; it is null and void.[2375] Secondly, guideline 4.5.1 is "downstream" from guidelines 3.1 and 3.3.3, of which it draws the consequences: the latter establish the conditions under which a reservation is impermissible, whereas guideline 4.5.1 infers from such impermissibility that the reservation is null and void and produces no legal effects.

(3) The purpose of the phrase "null and void" is to recall that this nullity is not dependent on the reactions of the other contracting States or contracting organizations, something that guidelines 3.3.3 and 4.5.2 state even more clearly.

[2369] See paragraph (2) of the general commentary to Part 3 of the Guide to Practice.

[2370] See above, paragraph (16) of the introductory commentary to section 4.5 of the Guide to Practice.

[2371] See paragraph (20) of the introductory commentary to section 4.5 of the Guide to Practice above. This broad scope explains why guideline 4.5.1 is in Part 4 and not Part 3 of the Guide to Practice (see *a contrario* the reasons for the inclusion of guideline 3.3.3 in Part 3, in paragraphs (11) and (12) of the commentary thereto.

[2372] Art. 23, para. 1, of the Vienna Conventions. See also guideline 2.1.1 (Form of reservations) and commentary.

[2373] Art. 23, para. 1, of the Vienna Conventions. See also guideline 2.1.5 (Communication of reservations) and commentary.

[2374] See guidelines 2.3 (Late formulation of a reservation) to 2.3.4 (Widening of the scope of a reservation) and commentaries.

[2375] In addition, section 4.5 is the counterpart for invalid reservations to guideline 4.1 for valid reservations (established reservations): these guidelines both relate to the two types of conditions (permissibility or formal validity) that allow a reservation to be considered "established", in the first case (provided that it was also accepted by at least one other contracting State or contracting organization), or "invalid", in the second case.

(4) While the nullity of a reservation and the consequences or effects of that nullity are certainly interdependent, they are nonetheless different issues. It is not possible first to consider the effects of an impermissible reservation and then to deduce its nullity: the fact that a legal act produces no effect does not necessarily mean that it is null and void. It is the characteristics of the act that influence its effects, not the reverse. In that regard, the nullity of an act is merely one of its characteristics, which, in turn, influences the capacity of the act to produce (or not to produce) or to modify (or not to modify) a legal situation.

(5) With regard to acts which are null and void under civil law, the great French jurist Marcel Planiol has explained:

> "*Un acte juridique est nul lorsqu'il se trouve privé d'effets par la loi, bien qu'il ait été réellement accompli, et qu'aucun obstacle ne le rende inutile. La nullité suppose que l'acte pourrait produire tous ses effets, si la loi le permettait*" [A legal act is null and void when it is deprived of effect by law, even if it was in fact carried out and no obstacle renders it useless. Nullity presupposes that the act could produce all of its effects if the law allowed it to do so].[2376]

The *Dictionnaire du droit international public* defines "nullity" as follows:

> "*Caractéristique d'un acte juridique, ou d'une disposition d'un acte, dépourvu de valeur juridique, en raison de l'absence des conditions de forme ou de fond nécessaires pour sa validité*" [Characteristic of a legal act or of a provision of an act, lacking legal effect due to the absence of formal or substantive conditions necessary for its validity].[2377]

This is precisely the situation in the case of a reservation which does not meet the criteria for permissibility under article 19 of the Vienna Conventions: it does not meet the requirements for permissibility and, for this reason, has no legal effect. Had the reservation met the requirements for permissibility, it could have produced legal effects.

(6) Leaving it to the contracting States and contracting organizations to assess the permissibility of a reservation ultimately amounts to depriving article 19 of the Vienna Conventions (the 1986 text of which is reproduced in guideline 3.1) of any real impact, even though it is central to the Vienna regime and formulates (*a contrario*, at least) the conditions for the permissibility of reservations not as a set of factors which States and international organizations should take into account, but in prescriptive language.[2378] The opposite position would imply that States could validate a reservation that does not meet the conditions for permissibility established in the 1969 and 1986 Vienna Conventions by accepting it; this would contradict guideline 3.3.3 (Absence of effect of individual acceptance of a reservation on the permissibility of the reservation) and would deprive article 19 of any substance.

(7) It therefore is reasonable and in keeping with the logic of the Vienna regime to adopt this solution on which those who espouse permissibility and those who espouse opposability[2379] agree, and which also accords with the positions taken by the human rights

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[2376] Cited by P. Guggenheim, "La validité et la nullité des actes juridiques internationaux", *Receuil des Cours* ..., vol. 74, 1949-I, p. 208.

[2377] J. Salmon (ed.), *Dictionnaire de droit international public*, footnote 1016, p. 760 ("*Nullité*").

[2378] "A State may ... formulate a reservation, unless ..." which clearly means *a contrario* "a State *may not* formulate a reservation *if* ...".

[2379] Even though they do not draw all the consequences. On the opposition between these two "schools", see paragraph (4) of the introductory commentary to Part 3 of the Guide to Practice (Permissibility of reservations and interpretative declarations); see also the preliminary report on reservations to treaties, A/CN.4/470, *Yearbook ... 1995*, vol. II (Part One), pp. 142–143, paras. 101–105.

treaty bodies,[2380] namely that failure to respect the conditions for the permissibility of reservations laid down in article 19 of the Vienna Conventions and reproduced in guideline 3.1 (Permissible reservations) nullifies the reservation.

(8) The nullity of an impermissible reservation is in no way a matter of *lex ferenda*; it is solidly established in State practice. It is not unusual for States to formulate objections to reservations incompatible with the object and purpose of the treaty while at the same time noting that they consider the reservation to be "null and void".

(9) As early as in 1955 and 1957, upon ratifying the Geneva Conventions on humanitarian law, the United Kingdom and the United States of America made objections to reservations formulated by several Eastern European States, stating that, since the reservations in question were null and void, the Conventions in their entirety applied to the reserving States. Thus, the United Kingdom declared:

> "[w]hilst they regard all the above-mentioned States as being parties to the above-mentioned Conventions, they do not regard the above-mentioned reservations thereto made by those States as valid, and will therefore regard any application of any of those reservations as constituting a breach of the Convention to which the reservation relates".[2381]

For its part, in 1982,

> "the Government of the Union of Soviet Socialist Republics [did] not recognize the validity of the reservation made by the Government of the Kingdom of Saudi Arabia on its accession to the 1961 Vienna Convention on Diplomatic Relations, since that reservation [was] contrary to one of the most important provisions of the Convention, namely, that 'the diplomatic bag shall not be opened or detained'".[2382]

Similarly, Italy formulated an objection to the reservation to the International Covenant on Civil and Political Rights formulated by the United States:

> "In the opinion of Italy reservations to the provisions contained in article 6 are not permitted, as specified in article 4, paragraph 2, of the Covenant.
>
> "Therefore this reservation is null and void since it is incompatible with the object and the purpose of article 6 of the Covenant."[2383]

In 1995, Finland, the Netherlands and Sweden made comparable objections to the declarations formulated by Egypt upon acceding to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. In its objection, the Netherlands stated

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[2380] See paragraph (15) of the commentary to guideline 3.2 (Assessment of the permissibility of a reservation), as well as the commentary to guidelines 3.2.1 (Competence of the treaty monitoring bodies to assess the permissibility of reservations) and 3.2.2 (Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations).

[2381] United Nations, *Treaty Series*, vol. 278, 1957, p. 268. See also the identical objections in connection with the four Geneva Conventions made by the United States of America. The objection in connection with the Geneva Convention relative to the treatment of prisoners of war reads: "Rejecting the reservations which States have made with respect to the Geneva Convention relative to the treatment of prisoners of war, the United States accepts treaty relations with all parties to that Convention, except to the changes proposed by such reservations" (*ibid.*, vol. 213, 1955, p. 383).

[2382] *Multilateral Treaties* ..., chap. III.3.

[2383] *Ibid.*, chap. IV.4.

> "the Kingdom of the Netherlands considers the declaration on the requirement of prior permission for passage through the territorial sea made by Egypt a reservation which is null and void".[2384]

The Governments of Finland and Sweden also stated in their objections that they considered the declarations to be null and void or devoid of legal effect.[2385] The reactions of Sweden to reservations judged invalid frequently contain this statement, regardless of whether the reservation is prohibited by the treaty,[2386] was formulated late[2387] or is incompatible with the object and purpose of the treaty.[2388] In the latter category, Sweden's reaction to the declaration in respect of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment formulated by the German Democratic Republic[2389] is particularly explicit:

> "The Government of Sweden has come to the conclusion that the declaration made by the German Democratic Republic is incompatible with the object and purpose of the Convention and therefore is invalid according to article 19 (c) of the Vienna Convention on the Law of Treaties."[2390]

(10) The Government of Sweden makes it clear that the nullity of the reservation is a consequence not of the objection made by the Government of Sweden, but of the fact that the declaration made by the German Democratic Republic does not satisfy the conditions for the permissibility of a reservation. This is an objective matter which does not depend on the reactions of the other contracting States or contracting organizations, even though they may help to assess the compatibility of the reservation with the requirements of article 19 of the Vienna Conventions as reflected in guideline 3.1 (Permissible reservations).[2391]

[2384] *Ibid.*, chap. XXVII.3. Article 26, paragraph 1, of the Basel Convention stipulates that "No reservation or exception may be made to this Convention."

[2385] *Ibid.*, chap. XXVII.3.

[2386] *Ibid.*

[2387] Sweden's objection to Egypt's late declaration to the Basel Convention was, however, justified by both the Convention's prohibition of reservations and the fact that "these declarations were made almost two years after the accession by Egypt contrary to the rule laid down in article 26, paragraph 2 of the Basel Convention" (*ibid.*). Finland, however, justified its objection based solely on the fact that the declarations were, in any event, late (*ibid.*). Belgium also considered that the declarations formulated by Egypt were late and that "for these reasons, the deposit of the aforementioned declarations cannot be allowed, regardless of their content" (*ibid.*).

[2388] See Sweden's objections to the reservations to the International Covenant on Civil and Political Rights formulated by Mauritania and the Maldives (*ibid.*, chap. IV.4); its objections to the reservations to the Convention on the Elimination of All Forms of Discrimination against Women formulated by the Democratic People's Republic of Korea, Bahrain, the Federated States of Micronesia, the United Arab Emirates, Oman and Brunei (*ibid.*, chap. IV.8) and its objections to the reservation and interpretive declaration to the Convention on the Rights of Persons with Disabilities formulated by El Salvador and Thailand, respectively (*ibid.*, chap. IV.15).

[2389] The German Democratic Republic had declared upon signing and ratifying the Convention that it "will bear its share only of those expenses in accordance with article 17, paragraph 7, and article 18, paragraph 5, of the Convention arising from activities under the competence of the Committee as recognized by the German Democratic Republic" (*ibid.*, chap. IV.9). See also the third report on reservations to treaties (A/CN.4/491 and Add.1 to 6), *Yearbook ... 1998*, vol. II (Part One), p. 259, para. 217.

[2390] *Multilateral Treaties ...*, chap. IV.9.

[2391] See also paragraphs (1) to (3) of the commentary to guideline 3.3.3.

(11) Individually, the contracting States and contracting organizations are not competent to determine the nullity of an invalid reservation.[2392] Moreover, that is not the purpose of such objections, and they should not be understood in that manner.

(12) However, and this is particularly important in a system that lacks a control and annulment mechanism, such objections express the views of their authors on the question of the validity and effects of an invalid reservation[2393] and are of particular importance in the context of the reservations dialogue. As the representative of Sweden pointed out in 2005 in the Sixth Committee:

> "Theoretically, an objection was not necessary in order to establish that fact but was merely a way of calling attention to it. The objection therefore had no real legal effect of its own and did not even have to be seen as an objection per se; consequently, the time limit of 12 months specified in article 20, paragraph 5, of the Convention, should not apply. However, in the absence of a body that could authoritatively classify a reservation as invalid, such as the European Court of Human Rights, such 'objections' still served an important purpose."[2394]

(13) It is also highly significant that in formulating objections to reservations that they consider invalid, States often pay very little attention to the conditions governing the efficacy of their objections. With regard to the Convention against Torture, for example, nine States[2395] formulated objections against four reservations; of the 18 objections, 12 were late, which tends to show that their authors were convinced that the nullity of the reservations in question did not depend on their negative reactions but existed *ipso facto* independently of them. In other words, these objections *recognize* a pre-existing nullity based on objective criteria.

(14) Simply to state that a reservation is null and void, as in the first part of guideline 4.5.1, does not resolve the question of the effects — or lack thereof — of this nullity on the treaty and on potential treaty relations between the author of the reservation and the other contracting States or contracting organizations; the Vienna Conventions are silent on this matter.[2396] It is therefore necessary to refer to the basic principles underlying all the law of treaties (beginning with the rules applicable to reservations), above all, the principle of consent.

(15) Many objections are formulated in respect of reservations that are considered impermissible, either because they are prohibited by the treaty or because they are incompatible with its object and purpose, without precluding the entry into force of the treaty. This practice is fully consistent with the principle set out in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions, although it might seem surprising that it was primarily (but not exclusively) the Western States which, at the Vienna Conference, expressed serious misgivings regarding the reversal of presumption that was strongly supported by the Eastern countries.[2397] However, the fact that *the treaty* remains in force

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[2392] See also J. Klabbers, footnote 2204 above, p. 184.

[2393] See also guideline 3.2 (Assessment of the permissibility of a reservation).

[2394] A/C.6/60/SR.14, para. 22.

[2395] Denmark, France, Finland, Germany, Luxembourg, the Netherlands, Norway, Spain and Sweden (*Multilateral Treaties* ..., chap. IV.9).

[2396] See paragraphs (1) to (13) of the introductory commentary to section 4.5 above.

[2397] See paragraphs (7) to (13) of the commentary to guideline 4.3.5 above (Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect). See also paragraph (1) of the commentary to guideline 2.6.7 (Expression of intention to preclude the entry into force of the treaty).

between the author of the reservation and the author of the objection does not answer the question of the status *of the reservation*.

(16) Belgium's objection to the reservations of the United Arab Republic and the Kingdom of Cambodia to the Convention on Diplomatic Relations illustrates the problem. Upon ratifying the Convention in 1968, the Belgian Government stated that it considered

> "the reservation made by the United Arab Republic and the Kingdom of Cambodia to paragraph 2 of article 37 to be incompatible with the letter and spirit of the Convention",[2398]

without drawing any particular consequences. However, in 1975, in reaction to the confirmation of these reservations and to a comparable reservation by Morocco, Belgium explained:

> "The Government of the Kingdom of Belgium objects to the reservations made with respect to article 27, paragraph 3, by Bahrain and with respect to article 37, paragraph 2, by the United Arab Republic (now the Arab Republic of Egypt), Cambodia (now the Khmer Republic) and Morocco. The Government nevertheless considers that the Convention remains in force as between it and the aforementioned States, respectively, *except in respect of the provisions which in each case are the subject of the said reservations*."[2399]

In other words, according to Belgium, despite the reservations' incompatibility with "the letter and spirit" of the Convention, the latter would enter into force between Belgium and the authors of the impermissible reservations. However, the provisions to which the reservations referred would not apply as between the authors of those reservations and Belgium; this amounts to giving impermissible reservations the same effect as permissible reservations.

(17) The approach taken in Belgium's objection, appears to correspond to the one envisaged in article 21, paragraph 3, of the Vienna Conventions in the case of a simple objection.[2400]

[2398] *Multilateral Treaties* ..., chap. III.3.

[2399] *Ibid.* (emphasis added).

[2400] See the commentary to guideline 4.3.6 (Effect of an objection on treaty relations). See also the Netherlands' objection to the reservation to the International Covenant on Civil and Political Rights formulated by the United States of America:

> "The Government of the Kingdom of the Netherlands objects to the reservations with respect to capital punishment for crimes committed by persons below eighteen years of age, since it follows from the text and history of the Covenant that the said reservation is incompatible with the text, the object and purpose of article 6 of the Covenant, which according to article 4 lays down the minimum standard for the protection of the right to life.
>
> "The Government of the Kingdom of the Netherlands objects to the reservation with respect to article 7 of the Covenant, since it follows from the text and the interpretation of this article that the said reservation is incompatible with the object and purpose of the Covenant.
>
> "In the opinion of the Government of the Kingdom of the Netherlands this reservation has the same effect as a general derogation from this article, while according to article 4 of the Covenant, no derogations, not even in times of public emergency, are permitted.
>
> "It is the understanding of the Government of the Kingdom of the Netherlands that the understandings and declarations of the United States do not exclude or modify the legal effect of provisions of the Covenant in their application to the United States, and do not in any way limit the competence of the Human Rights Committee to interpret these provisions in their application to the United States.

(18) It is, however, highly debatable; it draws no real consequences from the nullity of the reservation but treats it in the same way as a valid reservation by letting in "through the back door" what was excluded by the authors of the 1969 and 1986 Vienna Conventions.[2401] Unquestionably, nothing in the wording of article 21, paragraph 3, of the Vienna Conventions expressly suggests that it does not apply to the case of invalid reservations, but it seems clear

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> "*Subject to the proviso of article 21, paragraph 3 of the Vienna Convention of the Law of Treaties*, these objections do not constitute an obstacle to the entry into force of the Covenant between the Kingdom of the Netherlands and the United States" (*ibid.*, chap. IV.4, emphasis added).

See also the objection of the United States of America to the reservations formulates to the same Covenant by Pakistan:

> "The Government of the United States of America objects to Pakistan's reservations to the ICCPR. Pakistan has reserved to Articles 3, 6, 7, 12, 13, 18, 19, and 25 of the Covenant, which address the equal right of men and women to the full enjoyment of civil and political rights, the right to life, protections from torture and other cruel inhuman or degrading treatment or punishment, freedom of movement, expulsion of aliens, the freedoms of thought, conscience and religion, the freedom of expression, and the right to take part in political affairs. Pakistan has also reserved to Article 40, which provides for a process whereby States Parties submit periodic reports on their implementation of the Covenant when so requested by the Human Rights Committee (HRC). These reservations raise serious concerns because they both obscure the extent to which Pakistan intends to modify its substantive obligations under the Covenant and also foreclose the ability of other Parties to evaluate Pakistan's implementation through periodic reporting. *As a result, the United States considers the totality of Pakistan's reservations to be incompatible with the object and purpose of the Covenant. This objection does not constitute an obstacle to the entry into force of the Covenant between the United States and Pakistan, and the aforementioned articles shall apply between our two States, except to the extent of Pakistan's reservations.*" (*ibid*, emphasis added).

In its observations on general comment No. 24 of the Human Rights Committee, the United Kingdom also gave some weight to the exclusion of the parties to the treaty to which a reservation relates: "[t]he United Kingdom is absolutely clear that severability would entail excising both the reservation and the parts of the treaty to which it applies. Any other solution they would find deeply contrary to principle, notably the fundamental rule reflected in Article 38 (1) of the Statute of the International Court of Justice, that international conventions establish rules 'expressly recognized by' the Contracting States. The United Kingdom regards it as hardly feasible to try to hold a State to obligations under the Covenant which it self-evidently has not 'expressly recognized' but rather has indicated its express unwillingness to accept" (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), vol. I, p. 133, para. 14).

In its report to the 18th meeting of chairpersons of the human rights treaty bodies, the working group on reservations also did not completely rule out such an approach. In its recommendations, it suggested that "the only foreseeable consequences of invalidity are that the State could be considered as not being a party to the treaty, or *as a party to the treaty but the provision to which the reservation has been made would not apply*, or as a party to the treaty without the benefit of the reservation" (HRI/MC/2006/5/Rev.1, para. 16, recommendation No. 7, emphasis added). This position was, however, subsequently modified (see footnote XXX below).

[2401] See the United Kingdom's observations on general comment No. 24 of the Human Rights Committee (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), vol. I, p. 133, para. 13). See also the Sub-Commission on the Promotion and Protection of Human Rights expanded working paper by Ms. Françoise Hampson on the question of reservations to human rights treaties, prepared in accordance with Sub-Commission decision 2001/17 (E/CN.4/Sub.2/2003/WP.2), para. 16.

from the *travaux préparatoires* that this question was no longer considered relevant to the draft article that was the basis for this provision.[2402]

(19) As the representative of Sweden, speaking on behalf of the Nordic countries, rightly explained during the Sixth Committee's debate on the report of the Commission on the work of its fifty-seventh session:

> "A reservation incompatible with the object and purpose of a treaty was not formulated in accordance with article 19, so that the legal effects listed in article 21 did not apply. When article 21, paragraph 3, stated that the provisions to which the reservation related did not apply as between the objecting State and the reserving State to the extent of the reservation, it was referring to reservations permitted under article 19. It would be unreasonable to apply the same rule to reservations incompatible with the object and purpose of a treaty. Instead, such a reservation should be considered invalid and without legal effect."[2403]

(20) Moreover, that the Vienna rules do not pertain to the effects of invalid reservations is clearly confirmed by the great majority of States' reactions to reservations that they consider invalid. Whether or not they state explicitly that their objection will not preclude the entry into force of the treaty with the author of the reservation, they nevertheless state unambiguously that an impermissible reservation is devoid of any legal effect.

(21) The objections made many years ago by the United States of America and the United Kingdom to some of the reservations formulated by Eastern European States to the 1949 Geneva Conventions are significant examples.[2404]

(22) Belarus, Bulgaria, Russia and Czechoslovakia also made objections to the Philippines' "interpretative declaration", which they considered a reservation, to the United Nations Convention on the Law of the Sea, stating that this reservation was devoid of legal force or effect.[2405] Norway and Finland made objections to a declaration by the German Democratic Republic in respect of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[2406] the declaration was also criticized by several other States, which considered that "any such declaration is without legal effect, and cannot in any manner diminish the obligation of a government to contribute to the costs of the Committee in conformity with the provisions of the Convention".[2407] Moreover, Portugal, in its objection to the Maldives' reservation to the Convention on the Elimination of All Forms of Discrimination against Women, stated that:

> "these reservations cannot alter or modify in any respect the obligations arising from the Convention for any State party thereto."[2408]

[2402] See paragraphs (5) to (13) of the introductory commentary to section 4.5 above.

[2403] A/C.6/60/SR.14, para. 22. See also Malaysia (A/C.6/60/SR.18, para. 86) and Greece (A/C.6/60/SR.19, para. 39), as well as the report of the meeting of the working group on reservations to the 19th meeting of chairpersons of the human rights treaty bodies and the sixth inter-committee meeting of the human rights treaty bodies (HRI/MC/2007/5, para. 18): "It cannot be envisaged that the reserving State remains a party to the treaty with the provision to which the reservation has been made not applying."

[2404] See paragraphs (9) and (10) of the commentary to the present guideline.

[2405] *Multilateral Treaties* ..., chap. XXI.6.

[2406] See footnote 2389 above.

[2407] *Multilateral Treaties* ..., chap. IV.9.

[2408] *Ibid.*, chap. IV.8.

(23) State practice is extensive — and essentially homogeneous — and is not limited to a few specific States. Recent objections by Finland,[2409] Sweden;[2410] other States, such as Belgium,[2411] Spain,[2412] the Netherlands,[2413] the Czech Republic[2414] and Slovakia;[2415] and also the European Union[2416] quite often include a statement that the invalid reservation is

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[2409] See Finland's objections to Yemen's reservation to the International Convention on the Elimination of All Forms of Racial Discrimination (*ibid.*, chap. IV.2); to the reservations to the Convention on the Elimination of All Forms of Discrimination against Women formulated by Kuwait, Malaysia, Lesotho, Singapore and Pakistan (*ibid.*, chap. IV.8); to the reservations to the Convention on the Rights of the Child formulated by Malaysia, Qatar, Singapore and Oman (*ibid.*, chap. IV.11); and the reservation formulated by the United States of America upon consenting to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (*ibid.*, chap. XXVI.2).

[2410] See Sweden's objection to the reservation formulated by the United States of America upon consenting to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (*ibid.*, chap. XXVI.2). Sweden specified, however, that "this objection shall not preclude the entry into force of the Convention between the United States of America and Sweden. The Convention enters into force in its entirety between the United States of America and Sweden, without the United States of America benefiting from its reservation."

[2411] See Belgium's objection to Singapore's reservation to the Convention on the Rights of the Child: "The Government considers that paragraph 2 of the declarations, concerning articles 19 and 37 of the Convention and paragraph 3 of the reservations, concerning the constitutional limits upon the acceptance of the obligations contained in the Convention, are contrary to the purposes of the Convention and are consequently without effect under international law" (*ibid.*, chap. IV.9).

[2412] See Spain's objection to the reservation to the Convention on the Elimination of All Forms of Discrimination against Women formulated by Qatar: "The Government of the Kingdom of Spain believes that the aforementioned declarations ... have no legal force and in no way exclude or modify the obligations assumed by Qatar under the Convention" (*ibid.*, chap. IV.8).

[2413] See the Netherlands' objection to the reservation to the Convention on the Rights of Persons with Disabilities formulated by El Salvador: "It is the understanding of the Government of the Kingdom of the Netherlands that the reservation of the Government of the Republic of El Salvador does not exclude or modify the legal effect of the provisions of the Convention in their application to the Republic of El Salvador" (*ibid.*, chap. IV.15).

[2414] See the Czech Republic's objection to the reservation to the Convention on the Elimination of All Forms of Discrimination against Women formulated by Qatar: "[T]he Czech Republic, therefore, objects to the aforesaid reservations made by the State of Qatar to the Convention. This objection shall not preclude the entry into force of the Convention between the Czech Republic and the State of Qatar. The Convention enters into force in its entirety between the Czech Republic and the State of Qatar, without the State of Qatar benefiting from its reservation" (*ibid.*, chap. IV.8).

[2415] See the Slovak objection to the reservation to the International Covenant on Economic, Social and Cultural Rights formulated by Pakistan: "The International Covenant on Economic, Social and Cultural Rights enters into force in its entirety between the Slovak Republic and the Islamic Republic of Pakistan, without ... Pakistan benefiting from its reservation" (*ibid.*, chap. IV.3); and to the reservation to the Convention on the Elimination of All Forms of Discrimination against Women formulated by Qatar: "This objection shall not preclude the entry into force of the Convention on the Elimination of All Forms of Discrimination against Women between the Slovak Republic and the State of Qatar. The Convention (...) enters into force in its entirety between the Slovak Republic and the State of Qatar, without the State of Qatar benefiting from its reservations and declarations" (*ibid.*).

[2416] See the objections made jointly by the European Community and its members (Belgium, Denmark, the Federal Republic of Germany, France, Ireland, Italy, Luxembourg, the Netherlands and the United Kingdom) to the declarations to the Customs Convention on the International Transport of Goods under Cover of TIR Carnets formulated by Bulgaria and the German devoid of legal effect. It is highly revealing that, in principle, this practice of making objections with "super-maximum" effect[2417] elicits no opposition of principle from other contracting States or contracting organizations – including the authors of the reservations in question.

(24) The absence of any legal effect as a direct consequence of the nullity of an impermissible reservation — which, moreover, arises directly from the very concept of nullity[2418] — was also affirmed by the Human Rights Committee in its general comment No. 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant. The Committee considered that one aspect of the "normal consequence" of the impermissibility of a reservation was that its author did not have the benefit of the reservation.[2419] It is significant that, despite the active response to general comment No. 24 by the United States of America, France and the United Kingdom, none of the three States challenged this position.[2420]

(25) The Committee subsequently confirmed and applied this conclusion in its general comment No. 24 during its consideration of the *Rawle Kennedy v. Trinidad and Tobago* communication. In its decision on the admissibility of the communication,[2421] the Committee ruled on the permissibility of the reservation formulated by the State party on 26 May 1998 upon acceding again to the first Optional Protocol to the International Covenant on Civil and Political Rights, after having denounced the Optional Protocol on the same day. Through its reservation, Trinidad and Tobago sought to exclude the Committee's jurisdiction in cases involving prisoners under sentence of death.[2422] On the basis of the discriminatory nature of

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Democratic Republic. In the two identical objections, the authors noted: "The statement made (...) concerning article 52 (3) has the appearance of a reservation to that provision, although such reservation is expressly prohibited by the Convention. The Community and the Member States therefore consider that under no circumstances can this statement be invoked against them and they regard it as entirely void" (*ibid.*, chap. XI.A.16).

[2417] See paragraphs (1) to (4) of the commentary to guideline 4.3.8, and the eighth report on reservations to treaties (2003), (A .4/535/Add.1), para. 96. See also B. Simma, footnote 2364 above, pp. 667–668.

[2418] See paragraph (5) of the commentary to guideline 4.5.1.

[2419] Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/40), vol. I, p. 124, para. 18. See also Françoise Hampson's final working paper on reservations to human rights treaties (E/CN.4/Sub.2/2004/42), para. 57 ("It would be surprising if a human rights body were expected to give effect to a reservation which it had found to be incompatible with the object and purpose of the treaty") and para. 59 of her expanded working paper on the same topic (see footnote 2401 above): "A monitoring body cannot be expected to give effect to a reservation it has found to be incompatible with the objects and purposes of the treaty." The Human Rights Committee combined in a single statement the idea that an incompatible reservation cannot produce effects (which is not contested) and the question of the effect of that incompatibility on the author's status as a party (which has been widely debated; see commentary to guideline 4.5.3 below).

[2420] See the observations of the United States of America (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/40)), vol. I, annex VI, pp. 126–130; the United Kingdom (*ibid.*, pp. 130–134) and France (*ibid., Fifty-first Session, Supplement No. 10* (A/51/40)), vol. I, annex VI, pp. 104–106.

[2421] Communication No. 845/1999, decision of 2 November 1999 (CCPR/C/67/D/845/1999).

[2422] Also in accordance with its conclusions in general comment No. 24, the Committee maintained that the State party remained bound by the Optional Protocol; this cannot be taken for granted, even if it is agreed that Trinidad and Tobago was able to withdraw from the treaty and immediately reaccede to it (a point on which the Commission will not take a position) the validity of the reservation is doubtful, to say the least.

the reservation, the Committee considered that the reservation "cannot be deemed compatible with the object and purpose of the Optional Protocol".[2423] The Committee concluded,

> "The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol."[2424]

In other words, according to the Committee, Trinidad and Tobago's reservation did not exclude application of the Optional Protocol in respect of the applicant, who was a prisoner under sentence of death. It therefore produced neither the legal effect of an established reservation,[2425] nor that of a valid reservation to which an objection has been made.[2426] It produced no effect.

(26) The Inter-American Court of Human Rights has also held that an impermissible reservation seeking to limit the Court's jurisdiction could produce no effect. In *Hilaire v. Trinidad and Tobago*, the Court stressed:

> "Trinidad and Tobago cannot prevail in the limitation included in its instrument of acceptance of the optional clause of the mandatory jurisdiction of the Inter-American Court of Human Rights in virtue of what has been established in Article 62 of the American Convention, because this limitation is incompatible with the object and purpose of the Convention."[2427]

(27) The European Court of Human Rights took the same approach in the principle it invoked in *Belilos v. Switzerland*,[2428] *Weber v. Switzerland*,[2429] and *Loizidou v. Turkey*.[2430] In all three cases, the Court, after noting the invalidity of the reservations formulated by Switzerland and Turkey, applied the European Convention on Human Rights as if the reservations had not been formulated and, consequently, had produced no legal effect.

(28) In light of this general agreement, the Commission considers that the principle that an invalid reservation has no legal effect is part of positive law. This principle is set out in the second part of guideline 4.5.1.

(29) It is obviously correct (and inherent in the international legal system) that as long as an impartial third party with decision-making authority has not taken a position on the matter, the question of the validity of a reservation remains an open one (this, in fact, is what makes the reservations dialogue significant). However, the generalized relativism that is inevitably inferred from this position should not be encouraged: the substance of the applicable law (which the Guide to Practice endeavours to enunciate) must not be confused with the settlement of disputes that results from its application. A reservation is or is not valid, irrespective of the individual positions taken by States or international organizations in that regard and, accordingly, its nullity is not a subjective or relative matter, but should, as far as possible, be determined objectively — although this does not mean that the reactions of other

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[2423] *Ibid.*, para. 6.7.

[2424] *Ibid.*

[2425] See the guidelines in section 4.2 of the Guide to Practice.

[2426] See the guidelines in section 4.3 of the Guide to Practice.

[2427] Preliminary objection, judgment of 1 September 2001, *Hilaire v. Trinidad and Tobago*, *Series C*, No. 80, para. 98. See also the Court's judgment of 1 September 2001 on the preliminary objection in *Benjamin et al. v. Trinidad and Tobago*, *Series C*, No. 81, para. 89. In the latter judgment, the Court arrived at the same conclusions without, however, stating that the reservation was incompatible with the object and purpose of the Convention.

[2428] *Belilos v. Switzerland*, 29 April 1988, *Series A*, No. 132, para. 60.

[2429] *Weber v. Switzerland*, 22 May 1990, *Series A*, No. 177, paras. 36–38.

[2430] *Loizidou v. Turkey*, 23 March 1995, *Series A*, No. 310, paras. 89–98.

parties are devoid of interest — but this is the subject of the guidelines in section 4.3 of the Guide to Practice. The idea is also reflected in guideline 4.5.2.

4.5.2 Reactions to a reservation considered invalid

1. The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization.

2. Nevertheless, a State or an international organization which considers that a reservation is invalid should formulate a reasoned objection as soon as possible.

Commentary

(1) Paragraph 1 of guideline 4.5.2 is essentially a reminder of a fundamental principle clearly implied in several previous guidelines, according to which the nullity of an invalid reservation depends on the reservation itself and not on the reactions it may elicit. Paragraph 2 should be seen as a recommendation to States and international organizations that they should not, as a consequence, refrain from objecting to such a reservation and specifying the reasons why they consider the reservation to be invalid.

(2) Paragraph 1 of guideline 4.5.2 follows directly from guideline 3.1 (Permissible reservations) (which reproduces the text of article 19 of the Vienna Conventions), guideline 3.3.3 (Absence of effect of individual acceptance of a reservation on the permissibility of the reservation) and guideline 4.5.1 (Nullity of an invalid reservation). It illustrates what is meant by the term "void" included in guideline 4.5.1, by serving as a reminder that the nullity of an invalid reservation is based on objective factors and does not depend on the reaction of a contracting State or contracting organization other than the author of the reservation – that is, as expressly indicated in paragraph 1, on their acceptance or their objection.

(3) In State practice, the great majority of objections are based on the invalidity of the reservation to which the objection is made. However, the authors of such objections draw very different conclusions from them: some simply note that the reservation is invalid while others state that it is null and void and devoid of legal effect. Sometimes (but very rarely), the author of the objection states that its objection precludes the entry into force of the treaty as between itself and the reserving State; sometimes, on the other hand, it states that the treaty enters into force in its entirety in these same bilateral relations, and sometimes it remains silent on that point.[2431]

[2431] The reactions to the reservation formulated by Qatar upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women illustrate nearly the full range of conceivable objections: while the 18 objections (including two late ones by Mexico and Portugal) all note that the reservation is incompatible with the object and purpose of the Convention, one (that of Sweden) adds that it is "null and void", and two others (those of Spain and the Netherlands) point out that the reservation does not produce any effect on the provisions of the Convention. Eight of these objections (those of Belgium, Finland, Hungary, Ireland, Italy, Mexico, Poland and Portugal) specify that the objections do not preclude the entry into force of the treaty, while ten (those of Austria, the Czech Republic, Estonia, Latvia, the Netherlands, Norway, Romania, Slovakia, Spain and Sweden) consider that the treaty enters into force for Qatar without the reserving State being able to rely on its impermissible reservation. See *Multilateral Treaties …*, chap. IV.8. See also the reactions mentioned above, footnote 2400.

(4) The case law of the International Court of Justice does not appear to be consistent on this point.[2432] In its 1999 orders concerning the requests for provisional measures submitted by Yugoslavia against Spain and the United States of America, the Court simply considered that:

> "Whereas the Genocide Convention does not prohibit reservations; whereas Yugoslavia did not object to Spain's reservation to article IX; and whereas the said reservation had the effect of excluding that Article from the provisions of the Convention in force between the Parties (…)."[2433]

The Court's reasoning did not include a review of the permissibility of the reservation, apart from the observation that the 1948 Convention did not prohibit it. The only determining factor seems to have been the absence of an objection by the State concerned; this reflects the position which the Court had taken in 1951 but which has now been superseded by the Vienna Convention, with which it is incompatible:[2434]

> "The object and purpose [of the treaty] (…) limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation."[2435]

Nonetheless, in its order concerning the request for provisional measures in the case of *Armed activities on the territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, the Court modified its approach by considering *in limine* the permissibility of Rwanda's reservation:

> "[T]hat reservation does not bear on the substance of the law, but only on the Court's jurisdiction; … it therefore does not appear contrary to the object and purpose of the Convention …".[2436]

And in its judgment on the jurisdiction of the Court and the admissibility of the application, the Court confirmed that:

> "Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation,

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[2432] See the joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma annexed to the judgment of 3 February 2006, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *I.C.J. Reports 2006*, pp. 65–71.

[2433] Orders of 2 June 1999, *Legality of Use of Force (Yugoslavia v. Spain), Provisional Measures, I.C.J. Reports 1999*, p. 772, para. 32, and *Legality of Use of Force (Yugoslavia v. United States of America), Provisional measures, I.C.J. Reports 1999*, p. 924, para. 24.

[2434] See paragraphs (2) to (9) of the commentary to guideline 2.6.2 (Right to formulate objections).

[2435] *I.C.J. Reports 1951* (see footnote 604 above), p. 24.

[2436] Order of 10 July 2002, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *I.C.J. Reports 2002*, p. 246, para. 72.

> application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention."[2437]

The Court thus "added its own assessment as to the compatibility of Rwanda's reservation with the object and purpose of the Genocide Convention".[2438] Even though an objection by the Democratic Republic of the Congo was not required in order to assess the permissibility of the reservation, the Court found it necessary to add:

> "[A]s a matter of the law of treaties, when Rwanda acceded to the Genocide Convention and made the reservation in question, the DRC made no objection to it."[2439]

(5) This clarification is not superfluous. Indeed, although an objection to a reservation does not determine the validity of the reservation as such, it is an important element to be considered by all actors involved – the author of the reservation, the contracting States and contracting organizations, and any body with competence to assess the validity of a reservation. Nonetheless, it should be borne in mind that, as the Court indicated in its 1951 advisory opinion:

> "each State which is a party to the Convention is entitled to appraise the validity of the reservation and it exercises this right individually and from its own standpoint."[2440]

(6) The judgment of the European Court of Human Rights in the *Loizidou* case also attaches great importance to the reactions of States parties as an important element to be considered in assessing the validity of Turkey's reservation.[2441] The Human Rights Committee confirmed this approach in its general comment No. 24:

> "The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant (...). However, an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant."[2442]

(7) As established above,[2443] the Vienna Conventions do not contain any rule concerning the effects of reservations that do not meet the conditions of permissibility set out in article 19, or — as a logical consequence thereof — concerning the potential reactions of States to such reservations. Under the Vienna regime, an objection is not an instrument by which contracting States or organizations determine the validity of a reservation; it has a different function: it

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[2437] Judgment of 3 February 2006, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, I.C.J. Reports 2006*, p. 32, para. 67.

[2438] Joint separate opinion, cited in footnote 2432 above, p. 70, para. 20.

[2439] Judgment of 3 February 2006, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda) Jurisdiction and Admissibility, I.C.J. Reports 2006*, p. 33, para. 68.

[2440] *I.C.J. Reports 1951*, footnote 604 above, p. 26. See also Inter-American Court of Human Rights advisory opinion, OC-2/82, 24 September 1982, *Series A*, No. 2, para. 38 ("The States Parties have a legitimate interest, of course, in barring reservations incompatible with the object and purpose of the Convention. They are free to assert that interest through the adjudicatory and advisory machinery established by the Convention").

[2441] See application No. 15318/89, Judgment of 23 March 1995, *Series A*, No. 310, para. 95. See also paragraph (8) of the commentary to guideline 4.5.2 above.

[2442] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), vol. I, pp. 123–124, para. 17.

[2443] See paragraphs (1) to (18) of the general commentary to section 4.5.

renders the reservation unopposable as against the author of the objection.[2444] The acceptances and objections mentioned in article 20 concern only valid reservations. The mere fact that these same instruments are used in State practice to react to invalid reservations does not mean that these reactions produce the same effects or that they are subject to the same conditions as objections to valid reservations.

(8) In the view of the Commission, however, this is not a sufficient reason not to consider such reactions as true objections. A negative reaction of this type is fully consistent with the definition of the term "objection" adopted by the Commission in guideline 2.6.1 and constitutes

> "a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to preclude the reservation from having its intended effects or otherwise opposes the reservation".

The mere fact that ultimately, it is not the objection that achieves the desired goal of depriving the reservation of effects, but rather the nullity of the reservation, does not change the goal sought by the objecting State or organization: to exclude all effects of the invalid reservation. Thus, it seems neither appropriate nor useful to create a new term for these reactions to reservations, since the current term not only corresponds to the definition of "objection" adopted by the Commission but is also used extensively in State practice and, it would appear, is universally accepted and understood.

(9) Moreover, although an objection to an invalid reservation adds nothing to the nullity of the reservation, it is undoubtedly a prime instrument both for initiating the reservations dialogue and for bringing the matter to the attention of treaty bodies and international and domestic courts if they are called upon to assess the validity of the reservation. Consequently, it would not be advisable — and would, in fact, be misleading — simply to note in the Guide to Practice that an objection to an invalid reservation is without effect.

(10) On the contrary, it is vitally important for States to continue to formulate objections to reservations that they consider invalid, even though such declarations do not add anything to the effects resulting *ipso jure* and without any other condition from the invalidity of the reservation. This is all the more important as there is no need to focus on the scarcity of bodies that are competent to assess the validity of a contested reservation. As is usual in international law, in this area as in many others, the absence of an objective assessment mechanism remains the rule, and its existence the exception.[2445] Hence, pending a very hypothetical intervention by an impartial third party, "each State establishes for itself its legal situation *vis-à-vis* other States"[2446] – including, of course, on the issue of reservations.

(11) States should not be discouraged from formulating objections to reservations that they consider invalid. On the contrary, in order to maintain stable treaty relations, they should be encouraged to do so and encouraged to provide, as far as possible, reasons for their

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[2444] See paragraphs (2) to (5) of the commentary to guideline 4.3.

[2445] Judgment of 18 July 1966, *South West Africa Cases, Second Phase, I.C.J. Reports 1966*, para. 86: "In the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception".

[2446] Decision of 9 December 1978, *Air Service Agreement of 27 March 1946 between the United States of America and France, United Nations, Reports of International Arbitral Awards*, vol. XVIII, p. 443, para. 81.

position.[2447] This is why guideline 4.5.2 not only sets out the principle that an objection to an invalid reservation does not, as such, produce effects; it also discourages any hasty inference, from the statement of that principle, that such an objection is futile.

(12) Indeed, from all standpoints, it is very important for States and international organizations to formulate an objection, when they deem it justified, in order to state publicly their position on the invalidity of a reservation. Nevertheless, they do so on the basis merely of their own power of appraisal, which is why paragraph 2 of guideline 4.5.2 takes the form of a simple recommendation to States and international organizations, the purely optional nature of which is evidenced by the use of the conditional "should" and the expression "if it deems it appropriate".

(13) Moreover, while it may be preferable, it is not indispensable[2448] for these objections to be formulated within the time period of 12 months, or within any other time period set out in the treaty.[2449] Although they have, as such, no legal effect on the reservation, such objections still serve an important purpose not only for the author of the reservation — which would be alerted to the doubts surrounding its validity — but also for the other contracting States or contracting organizations and for any authority that may be called upon to assess the validity of the reservation.

(14) This comment is not, however, to be taken as an encouragement to formulate late objections on the reasoning that, even without the objection, the reservation is null and void and produces no effect. It is in the interest of the author of the reservation, the other contracting States and contracting organizations and, more generally, of a stable, clear legal situation, for objections to invalid reservations to be made and for them to be formulated as quickly as possible, so that the legal situation can be appraised rapidly by all the actors and so that the author of the reservation can potentially remedy the invalidity within the framework of a reservations dialogue. For this reason, paragraph 2 of guideline 4.5.2 calls on States and organizations to formulate a reasoned objection "as soon as possible".

4.5.3 Status of the author of an invalid reservation in relation to the treaty

1. The status of the author of an invalid reservation in relation to a treaty depends on the intention expressed by the reserving State or international organization on whether it intends to be bound by the treaty without the benefit of the reservation or whether it considers that it is not bound by the treaty.

[2447] See guideline 2.6.9 (Statement of reasons), which recommends that the author of an objection to a reservation should indicate the reasons why it is being made.

[2448] The Government of Italy, in its late objection to Botswana's reservations to the International Covenant on Civil and Political Rights, explained: "The Government of the Italian Republic considers these reservations to be incompatible with the object and the purpose of the Covenant according to article 19 of the 1969 Vienna Convention on the Law of Treaties. These reservations do not fall within the rule of article 20, paragraph 5, and can be objected to at any time" (*Multilateral Treaties* ..., chap. IV.4. See also Italy's objection to the reservation of Qatar to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *ibid.*, chap. IV.9); and the position expressed by Sweden in the Sixth Committee during consideration of the report of the Commission on the work of its fifty-seventh session (A/C.6/60/SR.14, para. 22).

[2449] For other recent examples, see the objections of Portugal and Mexico to the reservation formulated by Qatar upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women (*Multilateral Treaties* ..., chap. IV.8). Both objections were made on 10 May 2010; Qatar's instrument of accession was communicated by the Secretary-General on 8 May 2009.

2. Unless the author of the invalid reservation has expressed a contrary intention or such an intention is otherwise established, it is considered a contracting State or a contracting organization without the benefit of the reservation.

3. Notwithstanding paragraphs 1 and 2, the author of the invalid reservation may express at any time its intention not to be bound by the treaty without the benefit of the reservation.

4. If a treaty monitoring body expresses the view that a reservation is invalid and the reserving State or international organization intends not to be bound by the treaty without the benefit of the reservation, it should express its intention to that effect within a period of twelve months from the date at which the treaty monitoring body made its assessment.

Commentary

(1) Guideline 4.5.1 does not resolve all the issues concerning the effects of the nullity of an invalid reservation. While it is established that such a reservation cannot produce legal effects, it is essential to answer the question of whether its author becomes a contracting party without the benefit of its reservation, or whether the nullity of its reservation also affects its consent to be bound by the treaty. Both approaches are consistent with the principle that the reservation has no legal effect: either the treaty enters into force for the author of the reservation without the latter benefiting from its invalid reservation, which thus does not have the intended effects; or the treaty does not enter into force for the author of the reservation and, obviously, the reservation also does not produce effects since no treaty relations exist.[2450] Guideline 4.5.3 proposes the principle of a middle solution between these apparently irreconcilable positions, based on the (simple – "rebuttable") presumption that the author of the reservation is bound by the treaty without being able to claim the benefit of the reservation, unless the author has expressed a contrary intention.

(2) The first alternative, the severability of an impermissible reservation from the reserving State's consent to be bound by the treaty,[2451] is currently supported to some extent by State practice. Many objections have clearly been based on the invalidity of a reservation and even, in many cases, have declared such a reservation to be null and void, and unable to produce effects; nevertheless, in nearly all cases, the objecting States have not opposed the treaty's entry into force and have even declared themselves to be in favour of the establishment of a treaty relationship with the author of the reservation. Since a reservation that is null and void has no legal effect, such a treaty relationship can only mean that the reserving State is bound by the treaty as a whole without benefit of the reservation.

(3) This approach is confirmed by the practice, followed in particular by the Nordic States,[2452] of formulating what have come to be called objections with "super-maximum" effect (or intent),[2453] along the lines of Sweden's objection to the reservation to the Convention on the Rights of Persons with Disabilities formulated by El Salvador:

> "The Government of Sweden therefore objects to the aforesaid reservation made by the Government of the Republic of El Salvador to the Convention on the Rights of

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[2450] See D.W. Greig, footnote 28 above, p. 52; and R. Goodman, "Human rights treaties, invalid reservations, and state consent", *American Journal of International Law*, vol. 96 (2002), p. 531.

[2451] For convincing arguments in favour of the negative presumption and severability, see O. de Frouville, footnote 1736 above, pp. 385–389; F. Coulée, footnote 1583 above, pp. 515–516; Bruno Simma and Gleider I. Hernandéz, footnote 1614 above, p. XXX; A. Pellet and D. Müller, footnote 1048 above, pp. 547–551.

[2452] Concerning this practice, see in particular, J. Klabbers, footnote 2204 above, pp. 183–186.

[2453] See footnote 2417 above.

> Persons with Disabilities and considers the reservation null and void. This objection shall not preclude the entry into force of the Convention between El Salvador and Sweden. The Convention enters into force in its entirety between El Salvador and Sweden, without El Salvador benefiting from its reservation."[2454]

(4) Such objections, of which the Nordic States — though not the originators of this practice[2455] — make frequent use, have been appearing for some 15 years and are used more and more often, especially by the European States. Apart from Sweden, Austria,[2456] the Czech Republic[2457] and the Netherlands[2458] have also sought to give super-maximum effect to their objections to the reservations of El Salvador and Thailand to the 2006 Convention on the Rights of Persons with Disabilities.

(5) More recently, in early 2010, several European States objected to the reservation formulated by the United States of America when expressing its consent to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. No fewer than five of these objections contain wording intended to produce so-called "super-maximum" effect.[2459] Likewise, Austria, the Czech Republic,

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[2454] *Multilateral Treaties* ..., chap. IV.15. See also Sweden's objection to the reservation to the same Convention formulated by Thailand (*ibid.*).

[2455] One of the earliest objections that, while not explicit in this regard, can be termed an objection with "super-maximum" effect was made by Portugal in response to the reservation by Maldives to the Convention on the Elimination of All Forms of Discrimination against Women (*Multilateral Treaties* ..., chap. IV.8).

[2456] *Multilateral Treaties* ..., chap. IV.15. In its objection, the Austrian Government stressed that "[t]his objection, however, does not preclude the entry into force, *in its entirety*, of the Convention between Austria and El Salvador" (emphasis added).

[2457] *Ibid.*

[2458] *Ibid.*, chap. IV.15. The Government of the Netherlands explained that "[i]t is the understanding of the Government of the Kingdom of the Netherlands that the reservation of the Government of the Republic of El Salvador does not exclude or modify the legal effect of the provisions of the Convention in their application to the Republic of El Salvador".

[2459] *Ibid.*, chap. XXVI.2: Austria ("[T]he Government of Austria objects to the aforementioned reservation made by the United States of America to the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects (Protocol III). This position however does not preclude the entry into force in its entirety of the Convention between the United States of America and Austria"); Cyprus ("[T]he Government of the Republic of Cyprus objects to the aforementioned reservation by the United States of America to Protocol III of the CCW. This position does not preclude the entry into force of the Convention between the United States of America and the Republic of Cyprus in its entirety"); Norway ("The Government of the Kingdom of Norway objects to the aforesaid reservation by the Government of the United States of America to the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) to the United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. However, this objection shall not preclude the entry into force of the Protocol in its entirety between the two States, without the United States of America benefiting from its reservation"); and Sweden ("The Government of Sweden objects to the aforesaid reservation made by the Government of the United States of America to Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects and considers the reservation without legal effect. This objection shall not preclude the entry into force of the Convention between the United States of America and Sweden. The Convention enters into force in its entirety between the United States of America and Sweden, without the United States of America benefiting from its reservation").

Estonia, Latvia, Norway, Romania, Slovakia and Spain included in their objections to Qatar's reservation to the Convention on the Elimination of All Forms of Discrimination against Women the proviso that those objections did not preclude the entry into force of the Convention as between those States and the reserving State, without the latter benefiting from the reservation.[2460] This largely European practice is undoubtedly influenced by the 1999 recommendation of the Council of Europe on responses to inadmissible reservations to international treaties, which includes a number of model response clauses for use by member States;[2461] the above-mentioned objections closely mirror these clauses.

(6) It is clear that this practice is supported to some extent by the decisions of human rights bodies and regional courts, such as the European and Inter-American Courts of Human Rights.

(7) In its landmark judgment in *Belilos v. Switzerland*,[2462] the European Court of Human Rights, sitting in plenary session, not only recharacterized the interpretative declaration formulated by the Swiss Government, but also had to decide whether the reservation (incorrectly characterized as an interpretative declaration) was valid. Having concluded that Switzerland's reservation was invalid, particularly in relation to the conditions set out in article 64[2463] of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), the Court added:

> "At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration."[2464]

In its judgment in *Weber v. Switzerland*,[2465] a chamber of the Court was called upon to decide whether article 6, paragraph 1, of the Convention was applicable, whether it had been violated by the respondent State and whether Switzerland's reservation in respect of that provision — which, according to the respondent State, was separate from its interpretative declaration — was applicable. In that connection, the Swiss Government claimed that "Switzerland's reservation in respect of Article 6 § 1 (art. 6-1) (…) would in any case prevent Mr. Weber from relying on non-compliance with the principle that proceedings before cantonal courts and judges should be public."[2466] The Court went on to consider the validity of Switzerland's reservation and, more specifically, whether it satisfied the requirements of article 64 of the Convention. It noted that the reservation

> "does not fulfil one of them, as the Swiss Government did not append 'a brief statement of the law — or laws — concerned' to it. The requirement of paragraph 2 of Article 64 (art. 64-2), however, 'both constitutes an evidential factor and contributes to legal certainty'; its purpose is to 'provide a guarantee — in particular for the other Contracting Parties and the Convention institutions — that a reservation does not go beyond the provisions expressly excluded by the State concerned' (see the *Belilos* judgment previously cited, Series A No. 132, pp. 27–28, § 59). Disregarding it is a breach not of 'a purely formal requirement' but of 'a condition of substance' (*ibid.*). The material reservation by Switzerland must accordingly be regarded as invalid."[2467]

[2460] *Multilateral Treaties* ..., chap. IV.8.

[2461] Council of Europe, Committee of Ministers, recommendation No. R(99)13, 18 May 1999.

[2462] Application No. 10328/83, Judgment of 29 April 1988, *Series A*, No. 132.

[2463] Now article 57.

[2464] Judgment of 29 April 1988, footnote 2462 above, para. 60.

[2465] Application No. 11034/84, Judgment of 22 May 1990, *Series A*, No. 177.

[2466] *Ibid.*, para. 36.

[2467] *Ibid.*, para. 38.

In contrast to its practice in the *Belilos* judgment, the Court did not go on to explore whether the nullity of the reservation had consequences for Switzerland's consent to be bound by the Convention. It simply confined itself to considering whether article 6, paragraph 1, of the Convention had in fact been violated, and concluded that "there ha[d] therefore been a breach of Article 6 § 1 (art. 6-1)".[2468] Thus, without saying so explicitly, the Court considered that Switzerland remained bound by the European Convention, despite the nullity of its reservation, and that it could not benefit from the reservation; that being the case, article 6, paragraph 1, was enforceable against it.

(8) In its judgment on preliminary objections in *Loizidou v. Turkey*,[2469] a chamber of the European Court took the opportunity to supplement and considerably clarify its jurisprudence. While in this case the issue of validity arose in respect not of a reservation to a provision of the Convention, but of a "reservation" to the optional declaration whereby Turkey recognized the compulsory jurisdiction of the Court pursuant to articles 25 and 46 of the Convention, the lessons of the judgment can easily be transposed to the problem of reservations. Having found that the restrictions *ratione loci* attached to Turkey's declarations of acceptance of the Court's jurisdiction were "invalid", the Strasbourg judges pursued their line of reasoning by considering "whether, as a consequence of this finding, the validity of the acceptances themselves may be called into question".[2470] They went on to state:

> "93. In addressing this issue the Court must bear in mind the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its mission, as set out in Article 19 (art. 19), 'to ensure the observance of the engagements undertaken by the High Contracting Parties'."
>
> "94. It also recalls the finding in its *Belilos v. Switzerland* judgment of 29 April 1988, after having struck down an interpretative declaration on the grounds that it did not conform to Article 64 (art. 64), that Switzerland was still bound by the Convention notwithstanding the invalidity of the declaration (Series A No. 132, p. 28, para. 60).
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> "95. The Court does not consider that the issue of the severability of the invalid parts of Turkey's declarations can be decided by reference to the statements of her representatives expressed subsequent to the filing of the declarations either (as regards the declaration under Article 25) (art. 25) before the Committee of Ministers and the Commission or (as regards both Articles 25 and 46) (art. 25, art. 46) in the hearing before the Court. In this connection, it observes that the respondent Government must have been aware, in view of the consistent practice of Contracting Parties under Articles 25 and 46 (art. 25, art. 46) to accept unconditionally the competence of the Commission and Court, that the impugned restrictive clauses were of questionable validity under the Convention system and might be deemed impermissible by the Convention organs. It is of relevance to note, in this context, that the Commission had already expressed the opinion to the Court in its pleadings in the *Belgian Linguistic* (Preliminary objection) and *Kjeldsen, Buşk Madsen and Pedersen v. Denmark* cases (judgments of 9 February 1967 and 7 December 1976, Series A Nos. 5 and 23 respectively) that Article 46 (art. 46) did not permit any restrictions in respect of recognition of the Court's jurisdiction (see respectively, the second memorial of the Commission of 14 July 1966, Series B No. 3, vol. I, p. 432, and the memorial of the Commission (Preliminary objection) of 26 January 1976, Series B No. 21, p. 119). The subsequent reaction of various Contracting Parties to the Turkish declarations (…)

[2468] *Ibid.*, para. 40.

[2469] Application No. 15318/89, Judgment of 23 March 1995, *Series A*, No. 310.

[2470] *Ibid.*, para. 89.

> lends convincing support to the above observation concerning Turkey's awareness of the legal position. That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46) — the latter subsequent to the statements by the Contracting Parties referred to above — indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves. Seen in this light, the *ex post facto* statements by Turkish representatives cannot be relied upon to detract from the respondent Government's basic — albeit qualified — intention to accept the competence of the Commission and Court.
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> "96. It thus falls to the Court, in the exercise of its responsibilities under Article 19 (art. 19), to decide this issue with reference to the texts of the respective declarations and the special character of the Convention regime. The latter, it must be said, militates in favour of the severance of the impugned clauses since it is by this technique that the rights and freedoms set out in the Convention may be ensured in all areas falling within Turkey's 'jurisdiction' within the meaning of Article 1 (art. 1) of the Convention.
>
> "97. The Court has examined the text of the declarations and the wording of the restrictions with a view to determining whether the impugned restrictions can be severed from the instruments of acceptance or whether they form an integral and inseparable part of them. Even considering the texts of the Articles 25 and 46 (art. 25, art. 46) declarations taken together, it considers that the impugned restrictions can be separated from the remainder of the text leaving intact the acceptance of the optional clauses.
>
> "98. It follows that the declarations of 28 January 1987 and 22 January 1990 under Articles 25 and 46 (art. 25, art. 46) contain valid acceptances of the competence of the Commission and Court."[2471]

(9) In its judgment on preliminary objections in *Hilaire v. Trinidad and Tobago*,[2472] the Inter-American Court of Human Rights likewise noted that, in the light of the object and purpose of the American Convention on Human Rights, Trinidad and Tobago could not benefit from the limitation included in its instrument of acceptance of the Court's jurisdiction but was still bound by its acceptance of that compulsory jurisdiction.[2473]

(10) With the individual communication, *Rawle Kennedy v. Trinidad and Tobago*, a comparable problem concerning a reservation formulated by the State party upon reacceding to the First Optional Protocol to the International Covenant on Civil and Political Rights was brought before the Human Rights Committee. Having found the reservation thus formulated to be impermissible by reason of its discriminatory nature, the Committee merely noted, "The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol."[2474] In other words, Trinidad and Tobago remained bound by the Protocol without benefit of the reservation.

(11) This decision of the Human Rights Committee is consistent with its conclusions in general comment No. 24 on issues relating to reservations made upon ratification or accession

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[2471] *Ibid.*, paras. 93–98.

[2472] Judgment of 1 September 2001, *Series C*, No. 80.

[2473] *Ibid.*, para. 98.

[2474] Communication No. 845/1999, decision of 2 November 1999 (CCPR/C/67/D/845/1999), para. 6.7. See also paragraph (25) of the commentary to guideline 4.5.1.

to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant,[2475] in which the Committee stated:

> "The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation."[2476]

(12) It should be noted that the wording adopted by the Committee does not suggest that this "normal" consequence is the only one possible or that other solutions may not exist.

(13) On the other hand, in its observations on the Human Rights Committee's general comment No. 24, France stated categorically

> "that agreements, whatever their nature, are governed by the law of treaties, that they are based on States' consent and that reservations are conditions which States attach to that consent; it necessarily follows that if these reservations are deemed incompatible with the purpose and object of the treaty, the only course open is to declare that this consent is not valid and decide that these States cannot be considered parties to the instrument in question."[2477]

(14) This view, which reflects the opposite answer to the question of whether the author of an impermissible reservation becomes a contracting State or contracting organization, is based on the principle that the nullity of the reservation affects the whole of the instrument of consent to be bound by the treaty. In its 1951 advisory opinion, the International Court of Justice responded to the General Assembly's question I along those same lines:

> "[A] State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; *otherwise, that State cannot be regarded as being a party to the Convention*."[2478]

(15) According to this approach, the reservation is seen as a *sine qua non* for the reserving State's consent to be bound by the treaty, which alone would be in conformity with the principle of consent. If the condition is not permissible, there is no consent on the part of the reserving State. In these circumstances, only the reserving State can take the necessary decisions to remedy the nullity of its reservation, and it should not be regarded as a party to the treaty until such time as it has withdrawn or modified its reservation.

(16) The practice of the Secretary-General as depositary of multilateral treaties also seems to confirm this radical solution. The *Summary of Practice* explains in this respect:

> "191. If the treaty forbids any reservation, the Secretary-General will refuse to accept the deposit of the instrument. The Secretary-General will call the attention of the State concerned to the difficulty and shall not issue any notification concerning the instrument to any other State concerned (…).
>
> "192. If the prohibition is to only specific articles, or conversely reservations are authorized only in respect of specific provisions, the Secretary-General shall act,

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[2475] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), vol. I, annex V, pp. 119–125.

[2476] *Ibid.*, p. 124, para. 18.

[2477] *Ibid.*, *Fifty-first Session, Supplement No. 40* (A/51/40), vol. I, p. 104, para. 13.

[2478] *I.C.J. Reports 1951*, footnote 604 above, p. 29 (emphasis added).

> *mutatis mutandis*, in a similar fashion if the reservations are not in keeping with the relevant provisions of the treaty. (…).
>
> "193. However, only if there is *prima facie* no doubt that the statement accompanying the instrument is an unauthorized reservation does the Secretary-General refuse the deposit. Such would evidently be the case if the statement, for example, read 'State XXX shall not apply article YYY', when the treaty prohibited all reservations or reservations to article YYY."[2479]

(17) State practice, while not completely non-existent, is even less consistent in this regard. For example, Israel, Italy and the United Kingdom objected to the reservation formulated by Burundi upon acceding to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973. But whereas these three States regard the reservation entered by the Government of Burundi as incompatible with the object and purpose of the Convention and are unable to consider Burundi as having validly acceded to the Convention until such time as the reservation is withdrawn,[2480] two other States (Federal Republic of Germany and France) that objected to Burundi's reservation did not include such a statement in their objections.[2481]

(18) The Government of the Netherlands formulated the following objection, in 1966.[2482]

> "The Government of the Kingdom of the Netherlands declares that it considers the reservations made by Albania, Algeria, Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, India, Morocco, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics in respect of article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature at Paris on 9 December 1948, to be incompatible with the object and purpose of the Convention. The Government of the Kingdom of the Netherlands therefore does not deem any State which has made or which will make such reservation a party to the Convention".

Mention can also be made of the objections formulated by Israel, Italy and the United Kingdom to the reservation formulated by Burundi to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973.[2483]

[2479] *Summary of Practice* ... footnote 75 above, p. 57, paras. 191–193. Concerning such a distinction see, however, guideline 3.3.1 (Irrelevance of distinction among the grounds for non-permissibility) and commentary.

[2480] *Multilateral Treaties* ..., chap. XVIII.7.

[2481] The objection of the Federal Republic of Germany read: "The Government of the Federal Republic of Germany considers the reservation made by the Government of Burundi concerning article 2, paragraph 2, and article 6, paragraph 1, of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, to be incompatible with the object and purpose of the Convention" (*ibid.*). The Government of France, upon acceding to the Convention, stated that it "objects to the declaration made by Burundi on 17 December 1980 limiting the application of the provisions of article 2, paragraph 2, and article 6, paragraph 1" (*ibid.*).

[2482] *Ibid.*, chap. IV.1.

[2483] "The Government of the State of Israel regards the reservation entered by the Government of Burundi as incompatible with the object and purpose of the Convention and is unable to consider Burundi as having validly acceded to the Convention until such time as the reservation is withdrawn.

(19) In the vast majority of cases, States that formulate objections to a reservation that they consider invalid expressly state that their objection does not preclude the entry into force of the treaty in their relations with the reserving State, and see no need to elaborate further on the content of any such treaty relationship. The Commission in 2005 sought comments from Member States on the following question:

> "States often object to a reservation that they consider incompatible with the object and purpose of the treaty, but without opposing the entry into force of the treaty between themselves and the author of the reservation. The Commission would be particularly interested in Governments' comments on this practice. It would like to know, in particular, what effects the authors expect such objections to have, and how, in Governments' view, this practice accords with article 19 (c) of the 1969 Vienna Convention on the Law of Treaties."[2484]

The views expressed by several delegations in the Sixth Committee in 2005 clearly showed that there was no agreement on the approach to be taken to the thorny question of the validity of consent to be bound by the treaty in the case of an invalid reservation. Several States[2485] maintained that this practice was "paradoxical" and that, in any event, the author of the objection "could not simply ignore the reservation and act as if it had never been formulated".[2486] The French delegation stressed that

> "such an objection would create the so-called 'super-maximum effect', since it would allow for the application of the treaty as a whole without regard to the fact that a reservation had been entered. That would compromise the basic principle of consensus underlying the law of treaties."[2487]

Others, however, noted that it would be better to have the author of the reservation become a contracting State or contracting organization than to exclude it from the circle of parties. In that regard, the representative of Sweden, speaking on behalf of the Nordic countries, said:

"In the view of the Government of Israel, the purpose of this Convention was to secure the world-wide repression of crimes against internationally protected persons, including diplomatic agents, and to deny the perpetrators of such crimes a safe haven."

"With regard to the reservation expressed by Burundi on 17 December 1980, [the Italian Government considers that] the purpose of the Convention is to ensure the punishment, world-wide, of crimes against internationally protected persons, including diplomatic agents, and to deny a safe haven to the perpetrators of such crimes. Considering therefore that the reservation expressed by the Government of Burundi is incompatible with the aim and purpose of the Convention, the Italian Government can not consider Burundi's accession to the Convention as valid as long as it does not withdraw that reservation."

"The purpose of this Convention was to secure the world-wide repression of crimes against internationally protected persons, including diplomatic agents, and to deny the perpetrators of such crimes a safe haven. Accordingly the Government of the United Kingdom of Great Britain and Northern Ireland regards the reservation entered by the Government of Burundi as incompatible with the object and purpose of the Convention, and are unable to consider Burundi as having validly acceded to the Convention until such time as the reservation is withdrawn."

Multilateral Treaties ... chap. XVIII.7.

[2484] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 29.

[2485] See A/C.6/60/SR.14, para. 3 (United Kingdom) and para. 72 (France), and A/C.6/60/SR.16, para. 20 (Italy) and para. 44 (Portugal).

[2486] A/C.6/60/SR.14, para. 72 (France).

[2487] *Ibid.*

> "The practice of severing reservations incompatible with the object and purpose of a treaty accorded well with article 19, which made it clear that such reservations were not expected to be included in the treaty relations between States. While one alternative in objecting to impermissible reservations was to exclude bilateral treaty relations altogether, the option of severability secured bilateral treaty relations and opened up possibilities of dialogue within the treaty regime."[2488]

(20) However, it should be noted that the advocates of this point of view have made the entry into force of the treaty conditional on the will of the author of the reservation: "However, account must be taken of the will of the reserving State regarding the relationship between the ratification of a treaty and the reservation."[2489]

(21) The same lack of agreement was evident in the discussion in the Sixth Committee during the sixty-fifth session of the General Assembly and the comments and observations made by Governments on draft guideline 4.5.2 (current guideline 4.5.3) provisionally adopted by the Commission in 2010.[2490] States were divided into two more or less equal groups, one in favour[2491] and one opposed[2492] to the positive presumption retained provisionally by the Commission and to the principle of severability of the invalid reservation from the rest of the treaty. All agreed, however, that the intention of the author of the reservation was the key criterion for determining whether the author was bound by the treaty or not, and that the author of the reservation was best placed to specify what that intention was. This led some States to suggest a compromise solution, giving greater weight to the role of the intention; thus, Austria and the United Kingdom proposed to retain the positive presumption of former draft guideline 4.5.2 but to allow authors of reservations to have the last word, by granting them the possibility of expressing a contrary intention. [2493] Guideline 4.5.3 is closely based on these proposals.

[2488] A/C.6/60/SR.14, para. 23 (Sweden). See also A/C.6/60/SR.17, para. 24 (Spain); A/C.6/60/SR.18, para. 86 (Malaysia); and A/C.6/60/SR.19, para. 39 (Greece).

[2489] A/C.6/60/SR.14, para. 23 (Sweden). See also the position of the United Kingdom (*ibid.*, para. 4): "On the related issue of the 'super-maximum effect' of an objection, consisting in the determination not only that the reservation objected to was not valid but also that, as a result, the treaty as a whole applied *ipso facto* in the relations between the two States, his delegation considered that that could occur only in the most exceptional circumstances, for example, if the State making the reservation could be said to have accepted or acquiesced in such an effect."

[2490] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10*, (A/65/10), para. 106, p. 192.

[2491] See A/C.6/65/SR.19, para. 66 (Denmark on behalf of the Nordic countries), *ibid.*, para. 82 (qualified approval by Austria); *ibid.*, para. 88 (Mexico); A/C.6/65/SR.20, para. 4 (Czech Republic); *ibid.*, para. 30 (Belgium); A/C.6/65/SR.21, para. 9 (South Africa); *ibid.*, para. 29 (qualified approval by Hungary); *ibid.*, para. 39 (Greece); A/CN.4/639, para. 133 (qualified approval by Austria); *ibid.*, paras. 134–136 (El Salvador); *ibid.*, paras. 137–145 (Finland); *ibid.*, para. 163 (Norway); *ibid.*, paras. 167–169 (qualified approval by Switzerland).

[2492] A/C.6/65/SR.19, paras. 92–94 (Germany); A/C.6/65/SR.20, para. 10 (Italy); *ibid.*, para. 14 (Portugal); *ibid.*, para. 22 (Egypt); *ibid.*, para. 54 (United Kingdom); *ibid.*, para. 57 (Thailand); *ibid.*, para. 59 (United States of America); *ibid.*, para. 63 (France); *ibid.*, para. 85 (qualified disapproval by India); A/C.6/65/SR.21, paras. 21–22 (Singapore); A/CN.4/639, paras. 131–132 (Australia); paras. 146–162 (Germany); paras. 164–166 (Portugal); paras. 170–182 (United States); A/CN.4/639/Add.1, p. 49 (France); pp. 50–51 (qualified disapproval by United Kingdom).

[2493] A/C.6/65/SR.19, para. 82 (Austria); A/CN.4/639, para. 133 (Austria); A/CN.4/639/Add.1, pp. 50–51 (United Kingdom). See also A/C.6/65/SR.21, para. 39 (Greece) and A/CN.4/639, para. 169 (Switzerland).

(22) Thus, the Commission has considered that, although the two approaches and the two points of view concerning the question of the entry into force of the treaty may initially appear diametrically opposed, both are consistent with the principle that underlies treaty law, namely, the principle of consent. Therefore, the Commission considers that the key to the problem is simply the will of the author of the reservation: does the author intend to be bound by the treaty even if its reservation is invalid — without benefit of the reservation — or is its reservation a *sine qua non* for its commitment to be bound by the treaty?

(23) In the context of the specific but comparable issue of reservations to declarations formulated under the optional clause concerning the compulsory jurisdiction of the International Court of Justice in article 36, paragraph 2, of the Statute of the Court, Judge Lauterpacht, in his dissenting opinion to the Court's judgment on the preliminary objections in the *Interhandel* case, stated:

> "If that reservation is an essential condition of the Acceptance in the sense that without it the declaring State would have been wholly unwilling to undertake the principal obligation, then it is not open to the Court to disregard that reservation and at the same time to hold the accepting State bound by the Declaration."[2494]

Thus, the important issue is the will of the author of the reservation and its intention to be bound by the treaty, with or without benefit of its reservation. This is also true in the case of more classic reservations to treaty provisions.

(24) In its judgment in the *Belilos* case, the European Court of Human Rights paid particular attention to Switzerland's position with regard to the European Convention. It expressly noted "it is beyond a doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of validity of the declaration".[2495] Thus, the Court clearly took into consideration the fact that Switzerland itself — the author of the invalid "reservation" — considered itself to be bound by the treaty despite the nullity of this reservation and had behaved accordingly.

(25) In the *Loizidou* case, the Strasbourg Court also based its judgment, if not on the will of the Turkish Government — which had maintained during the proceedings before the Court that "if the restrictions attached to the Articles 25 and 46 (art. 25, art. 46) declarations were not recognized to be valid, as a whole, the declarations were to be considered null and void in their entirety"[2496] — then on the fact that Turkey had knowingly run the risk that the restrictions resulting from its reservation would be declared invalid:

> "That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46) — the latter subsequent to the statements by the Contracting Parties referred to above — indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves."[2497]

(26) The "Strasbourg approach"[2498] thus consists of acting on the reserving State's will to be bound by the treaty even if its reservation is invalid.[2499] In so doing, the Court did not,

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[2494] *Interhandel (Switzerland v. United States of America), Preliminary Objections*, dissenting opinion of Sir Hersch Lauterpacht, *I.C.J. Reports 1959*, p. 117.

[2495] Judgment cited in footnote 2428 above, para. 60.

[2496] See footnote 2430 above, para. 90.

[2497] *Ibid.*, para. 95.

[2498] B. Simma, footnote 2364 above, p. 670.

[2499] See also footnote 2403 above. According to G. Gaja, "*Una soluzione alternativa alla quale si può giungere nella ricostruzione della volontà dello Stato autore della riserva è che tale Stato abbia inteso vincolarsi in base al trattato anche nel caso in cui la riserva fosse considerata*

however, rely only on the express declarations of the State in question — as, for example, it did in the *Belilos* case[2500] — it also sought to "reconstruct" the will of the State. As William A. Schabas has written:

> "The European Court did not set aside the test of intention in determining whether a reservation is severable. Rather, it appears to highlight the difficulty in identifying such intention and expresses a disregard for such factors as formal declarations by the State."[2501]

Only if it is established that the reserving State did not consider its reservation (which has been recognized as invalid) to be an essential element of its consent to be bound by the treaty is the reservation severable from its treaty undertaking.

(27) Moreover, the European Court of Human Rights and the Inter-American Court of Human Rights do not limit their consideration to the will of the State that is the author of the invalid reservation; both Courts take into account the specific nature of the instruments that they are mandated to enforce. In the *Loizidou* case, for example, the European Court drew attention to the fact that:

> "In addressing this issue the Court must bear in mind the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its mission, as set out in Article 19 (art. 19), 'to ensure the observance of the engagements undertaken by the High Contracting Parties'".[2502]

(28) The Inter-American Court, for its part, stressed in its judgment in the *Hilaire v. Trinidad and Tobago* case:

> "93. Moreover, accepting the said declaration in the manner proposed by the State would lead to a situation in which the Court would have the State's Constitution as its first point of reference, and the American Convention only as a subsidiary parameter, a situation which would cause a fragmentation of the international legal order for the protection of human rights, and which would render illusory the object and purpose of the Convention.
>
> "94. The American Convention and the other human rights treaties are inspired by a set of higher common values (centred around the protection of the human being), are endowed with specific supervisory mechanisms, are applied as a collective guarantee, embody essentially objective obligations, and have a special character that sets them apart from other treaties."[2503]

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inammissibile e quindi senza il beneficio della riserva" [An alternative conclusion that one might reach in analysing the will of the reserving State is that the State in question must have intended to be bound by the treaty even if the reservation was considered inadmissible, i.e., without the benefit of the reservation] (footnote 2274 above, p. 358).

[2500] On this case and its impact, see R. Baratta, footnote 701 above, pp. 160–163; H.J. Bourguignon, footnote 1830 above, pp. 347–386; I. Cameron and F. Horn, footnote 205 above, pp. 69–116; and G. Cohen-Jonathan, footnote 727 above, pp. 272–314; and S. Marks, "Reservations Unhinged: the Belilos case before the European Court of Human Rights", *International Comparative Law Quarterly*, vol. 39 (1990), pp. 300–327.

[2501] William A. Schabas, "footnote 1614 above, p. 322.

[2502] Footnote 2430 above, para. 93.

[2503] Judgment of 1 September 2001 (Preliminary objections), *Series C*, No. 80, paras. 93–94.

(29) The position expressed by the Human Rights Committee in its general comment No. 24 is even more categorical.[2504] In fact, the Committee makes no connection between the entry into force of the treaty, despite the nullity of the invalid reservation, and the will of the author in that regard. It simply states that the "normal consequence"[2505] is the entry into force of the treaty for the author of the reservation without benefit of the reservation. However, as noted above,[2506] this "normal" consequence, which the Committee apparently views as somewhat automatic, does not exclude (and, on the contrary, suggests) the possibility that the invalid reservation may produce other, "abnormal" consequences. However, the Committee is silent on both the question of what these other consequences might be, and the question of how and by what the "normal" consequence or a possible "abnormal" consequence might be triggered.

(30) In any event, the position taken by the human rights bodies has become noticeably nuanced in recent years. For example, at the fourth inter-committee meeting of the human rights treaty bodies and the seventeenth meeting of chairpersons of these bodies, it was noted:

> "In a meeting with ILC on 31 July 2003, HRC confirmed that the Committee continued to endorse general comment No. 24, and several members of the Committee stressed that there was growing support for the severability approach, but that there was no automatic conclusion of severability for inadmissible reservations but only a presumption."[2507]

In 2006, the working group on reservations established to examine the practice of human rights treaty bodies, in that regard, noted that there were several potential consequences of a reservation that had been ruled invalid. It ultimately proposed the following recommendation No. 7:

> "*The consequence that applies in a particular situation depends on the intention of the State at the time it enters its reservation.* This intention must be identified during a serious examination of the available information, with the rebuttable presumption that the State would prefer to remain a party to the treaty without the benefit of the reservation, rather than being excluded."[2508]

According to the revised recommendation No. 7 of 2007 submitted by the working group on reservations established to examine the practice of human rights treaty bodies,[2509] which the sixth inter-committee meeting of the human rights treaty bodies endorsed[2510] the same year:

> "As to the consequences of invalidity, the Working Group agrees with the proposal of the Special Rapporteur of the International Law Commission according to which an invalid reservation is to be considered null and void. It follows that a State will not be able to rely on such a reservation and, *unless its contrary intention is*

[2504] In her expanded working paper, Hampson states: "A monitoring body cannot be expected to give effect to a reservation it has found to be incompatible with the objects and purposes of the treaty. The result is the application of the treaty without the reservation, whether that is called 'severance' or disguised by the use of some other phrase, such as non-application" (see footnote 2401 above, para. 59).

[2505] See footnote 2413 above.

[2506] See paragraph (11) of the commentary to this guideline above.

[2507] Report on the practice of the treaty bodies with respect to reservations made to the core international human rights treaties (HRI/MC/2005/5), para. 37.

[2508] HRI/MC/2006/5/Rev.1, pp. 4–5, para 7 (emphasis added).

[2509] See HRI/MC/2007/5, pp. 6–8.

[2510] Report of the sixth inter-committee meeting of human rights treaty bodies (A/62/224), Annex, para. 48 (v).

incontrovertibly established, will remain a party to the treaty without the benefit of the reservation" (emphasis added).

(31) The deciding factor is still clearly the intention of the State that is the author of the invalid reservation. This is the principle set forth in paragraph 1 of guideline 4.5.3 (although the Commission has intentionally omitted the adverb "incontrovertibly", which appeared to impose a criterion that was too strict): the intention of the contracting State or contracting organization is the criteria on which its status as a party to the treaty must be assessed. Paragraph 3 clarifies that this intention can be expressed at any time.

(32) Consequently, the application of the treaty to the reserving State or organization without benefit of the reservation is not the automatic consequence of the nullity of a reservation, but simply the result of a presumption, as indicated in paragraph 2 of guideline 4.5.3. This position offers a reasonable compromise between the underlying principle of treaty law — mutual consent — and the principle that reservations prohibited by the treaty or incompatible with the object and purpose of the treaty are null and void.

(33) The statement that the author of the reservation "*is considered* a contracting State or contracting organization" was chosen in order to indicate clearly that the guideline states a mere presumption and does not have the irrebuttable nature of a rule. The word "unless" at the beginning of paragraph 2 has the same function.

(34) There may, however, be hesitation as to which way the presumption should be expressed; intellectually, the presumption could just as well be an intention that the treaty should enter into force as the reverse, that the author of the reservation did not intend for the treaty to enter into force.

(35) A negative presumption — refusing to consider the author of the reservation to be a contracting State or contracting organization until an intention to the contrary had been established — might, at first glance, appear to reflect better the principle of consent according to which, in the words of the International Court of Justice, "in its treaty relations a State cannot be bound without its consent".[2511] From this point of view, a State or international organization that has formulated a reservation — even though it is invalid — has, in fact, expressed its disagreement with the provision or provisions which the reservation purports to modify or the legal effect of which it purports to exclude. In its observations on general comment No. 24, the United Kingdom states that it is "hardly feasible to try to hold a State to obligations under the Covenant which it self-evidently has not 'expressly recognized' but rather has indicated its express unwillingness to accept".[2512] From that point of view, no agreement to the contrary can be noted or presumed unless the State or organization in question consents, or at least acquiesces, to be bound by the provision or provisions without benefit of its reservation.

(36) The reverse, positive presumption has, nevertheless, several advantages which — apart from any consideration of desirability — argue in its favour even though undoubtedly it is not a rule established in the Vienna Conventions[2513] or a rule of customary international law.[2514]

[2511] *I.C.J. Reports 1951*, footnote 604 above, p. 21.

[2512] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), vol. I, p. 133, para. 14.

[2513] As noted above in the introduction to section 4.5 of the Guide to Practice, the Vienna Conventions do not address the issue of invalid reservations; see, paragraphs (1) to (18) of the general commentary to section 4.5 above.

[2514] See, in particular, Roberto Baratta, "Should invalid reservations to human rights treaties be disregarded?", *European Journal of International Law*, vol. 11 (2000), pp. 419–420.

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However, the decisions of the human rights courts, the positions taken by the human rights treaty bodies and the increasing body of State practice in this area should not be ignored. In fact, on closer inspection, it seems to be more in keeping with the principle of consent than the reverse presumption, because, more than the negative presumption, it preserves the will of the other contracting States and organizations while fully respecting that of the author of the reservation, on the understanding that the latter can express at any time its intention not to be bound by the treaty without the benefit of the reservation, as expressly stated in paragraph 3 of guideline 4.5.3.

(37) First of all, it should be borne in mind that the author of the reservation, by definition, wished to become a contracting party to the treaty in question. The reservation is formulated when the State or international organization expresses its consent to be bound by the treaty, thereby conveying its intention to enter the privileged circle of parties and committing itself to implementation of the treaty. The reservation certainly plays a role in this process, but it is not necessarily decisive.

(38) Furthermore, it is certainly wiser to presume that the author of the reservation is part of the circle of contracting States or contracting organizations in order to resolve the problems associated with the nullity of its reservation in the context of that privileged circle. In this regard, it must not be forgotten that, as the Commission has noted in its preliminary conclusions on reservations to normative multilateral treaties including human rights treaties,[2515]

> "in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State's either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty".[2516]

To that end, as was stressed at the fourth inter-committee meeting of the human rights treaty bodies and the seventeenth meeting of chairpersons of those bodies, "human rights treaty bodies" — or any other mechanism established by the treaty or the parties to the treaty as a whole — "should be encouraged to continue their current practice of entering into a dialogue with reserving States, with a view to effecting such changes in the incompatible reservation as to make it compatible with the treaty".[2517] This goal would certainly more readily be achieved if the reserving State or reserving international organization is deemed to be a party to the treaty.

(39) Moreover, presuming the entry into force of the treaty contributes to legal certainty. This presumption (which is simple, it must be emphasized, and therefore rebuttable) can help resolve the uncertainty between the formulation of the reservation and the establishment of its nullity; during this entire period (which may last several years),[2518] the author of the reservation has conducted itself as a party and been deemed to be so by the other parties.

(40) In light of these considerations, the Commission supports the idea of a rebuttable *presumption*, according to which the treaty would apply to a State or international organization that is the author of an invalid reservation, notwithstanding that reservation, in the absence of a contrary intention on the part of the author. In other words, if this basic

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[2515] *Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157.

[2516] *Ibid.*, p. 57 (para. 10 of the preliminary conclusions). The term "inadmissibility" ("*illicéité*") is to be understood as referring, in this context, to "impermissibility", see paragraphs (4) to (7) of the general commentary to Part 3 of the Guide to practice.

[2517] HRI/MC/2005/5, para. 42.

[2518] In the absence of a pronouncement by a competent organ, that uncertainty may last indefinitely.

condition is met (absence of a contrary intention on the part of the author of the reservation), the treaty is presumed to have entered into force for the author without the benefit of the reservation[2519] – provided that the treaty has effectively entered into force in respect of the other contracting States and contracting organizations.

(41) The expression "or such an intention is otherwise established", which appears in paragraph 2 of guideline 4.5.3, reflects the limits of this positive presumption adopted by the Commission subject to the intention of the reserving State or reserving international organization. If a contrary intention can be established, by any means whatsoever, the presumption falls away.

(42) Paragraph 3 goes even further in softening the strength of the presumption by providing that the author of an invalid reservation "may express at any time its intention not to be bound by the treaty without the benefit of the reservation". Although the Vienna Conventions do not envisage that possibility — in general, they are silent on how to deal with invalid reservations — it can be reconciled with the text of the Vienna Conventions. To be sure, article 42 provides that "the withdrawal of a party may take place only as a result of the application of the provisions of the treaty or of the present Convention".[2520] However, in the case in point, the author of the invalid reservation does not "withdraw" from the treaty, but signals its intention not to be bound by the treaty insofar as its reservation is considered invalid, since, in its eyes, the reservation is a decisive element of its treaty commitment.

(43) In practice, determining the intention of the author of an invalid reservation may be difficult. It is not easy to establish what led a State or an international organization to express its consent to be bound by the treaty, on the one hand, and to attach a reservation to that expression of consent, on the other, since "the State alone could know the exact role of its reservation to its consent".[2521] Since the starting presumption is rebuttable, however, it is vital to establish whether the author of the reservation would knowingly have ratified the treaty without the reservation or whether, on the contrary, it would have refrained from doing so.

(44) The text of the reservation itself may well contain elements that provide information about its author's intention in the event that the reservation is invalid. At least, that is the case when reasons for the reservation are given as recommended in guideline 2.1.2 of the Guide to Practice.[2522] The reasons given for formulating a reservation, in addition to clarifying its meaning, may also make it possible to determine whether the reservation is deemed to be an essential condition for the author's consent to be bound by the treaty. Any declaration made by the author of the reservation upon signing, ratifying or acceding to a treaty or making a notification of its succession thereto may also provide an indication. There are many possible formulations of the "contrary intention" of the author of the reservation not to be bound by the treaty without the benefit of the reservation, the intention referred to in paragraph 2 of guideline 4.5.3.

(45) When such an intention is not clearly expressed, other elements can provide guidance. This explains why the Commission stipulated in paragraph 2 that "such an intention" may be "otherwise established". In this connection, the reactions of other States and international organizations must also be taken into account. Although these reactions obviously cannot, in

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[2519] See paragraphs (14) to (17) of the commentary to guideline 4.5.1.

[2520] See also articles 54 and 56.

[2521] See the report of the International Law Commission on the work of its forty-ninth session, *Yearbook ... 1997*, vol. II (Part Two), p. 49, para. 83.

[2522] Guideline 2.1.2 (Statement of reasons for reservations): "A reservation should, to the extent possible, indicate the reasons why it is being formulated."

themselves, produce legal effects by neutralizing the nullity of the reservation, they can facilitate an assessment of the intention of the author of the reservation or, more accurately, the risk that it may voluntarily have run in formulating an invalid reservation. In particular, the author's failure to respond to the negative reactions may, in certain circumstances, help to establish its intention to be bound by the treaty. This is particularly well illustrated in the *Loizidou* case decided by the European Court of Human Rights; the Court, citing case law established before Turkey formulated its reservation, as well as the objections formulated by several States parties to the Convention,[2523] concluded that:

> "The subsequent reaction of various Contracting Parties to the Turkish declarations (...) lends convincing support to the above observation concerning Turkey's awareness of the legal position. That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46) — the latter subsequent to the statements by the Contracting Parties referred to above — indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves."[2524]

(46) In line with the approach taken by the European Court of Human Rights in its judgment in the *Belilos* case,[2525] one could also take into consideration the author's subsequent conduct with respect to the treaty. The representatives of Switzerland, by their actions and their statements before the Court, left no doubt that Switzerland would regard itself as bound by the European Convention even in the event that its "interpretative declaration" was deemed invalid.[2526] Moreover, as has been pointed out in relation to the reservations made by the United States of America to the International Covenant on Civil and Political Rights of 1966:

> "Certain aspects of the U.S. practice lend weight to the argument that its general intent is to be bound by the Covenant, whatever the outcome of litigation concerning the legality of the reservation. It is useful to recall that Washington fully participated in the drafting of the American Convention whose provisions are very similar to articles 6 and 7 of the Covenant and were in fact inspired by them. … Although briefly questioning the juvenile death penalty and the exclusion of political crimes, [the U.S. representative] did not object in substance to the provisions dealing with the death penalty or torture. The United States signed the American Convention on June 1, 1977 without reservation."[2527]

Although caution is certainly warranted when making comparisons between different treaties owing to the relative effect of any reservation,[2528] it is certainly not out of the question to refer to the prior attitude of the reserving State with regard to provisions similar to those to which the reservation relates. If a State consistently and systematically excludes the legal effect of a particular obligation contained in several instruments, such practice could certainly constitute significant proof that the author of the reservation does not wish to be bound by that obligation under any circumstances.

[2523] Application No. 15318/89, Judgment of 23 March 1995, *Series A*, No. 310, paras. 18–24.

[2524] *Ibid.*, para. 95.

[2525] See paragraphs (23) to (25) above.

[2526] Any declaration made subsequently, particularly declarations that the author of the reservation may be required to make in the context of judicial proceedings concerning the validity, and the effects of the invalidity, of its reservation, should, however, be treated with caution; see in this regard *Loizidou v. Turkey*, Application No. 15318/89, Judgment of 23 March 1995, *Series A*, No. 310, para. 95.

[2527] W.A. Schabas, footnote 1613 above, p. 322 (footnotes omitted).

[2528] See guideline 4.4.1 (Absence of effect on rights and obligations under other treaties) and commentary thereto.

(47) In addition to the actual text of the reservation and the reasons given for its formulation, as well as these circumstantial and contextual elements, the content and context of the provision or provisions of the treaty to which the reservation relates, on the one hand, and the object and purpose of the treaty, on the other, should also be taken into account. As mentioned above, the European Court of Human Rights and the Inter-American Court of Human Rights have paid considerable attention to the "special character" of the treaty in question; there is no reason to limit these considerations to human rights treaties, which do not constitute a special category of treaty for the purposes of applying rules relating to reservations and are not the only treaties to establish "higher common values".

(48) The combination of these factors — and of others, where appropriate — should serve as a guide to the authorities required to issue a ruling on the consequences of the nullity of an invalid reservation, given that this list is by no means exhaustive and that all elements that are likely to identify the intention of the author of the reservation must be taken into consideration. Their relative importance depends on the specific circumstances of each situation.

(49) That said, the Commission is of the view that the provisions of guideline 4.5.3, which form part of the cautious progressive development of international law, should not be taken as approval of what are now generally called objections with "super-maximum" effect. Whereas an objection with "super-maximum" effect apparently purports to require that the author of the reservation should be bound by the treaty without the benefit of its reservation simply because the reservation is invalid, the presumption embodied in guideline 4.5.3 acts merely as a safety net if it is impossible to determine the intention of the author of the reservation and it refrains from making its true intention known to the other contracting States and contracting organizations.

(50) Thus, the requirement that the treaty must be implemented in its entirety would derive not from a subjective assessment by another contracting party, but solely from the nullity of the reservation and the intention of its author. An objection, whether simple or with "super-maximum" effect, cannot produce such an effect. "No State can be bound by contractual obligations it does not consider suitable".[2529]

(51) Paragraph 4 of guideline 4.5.3 must be read in the light of guideline 3.2.1, according to which a treaty monitoring body may assess the permissibility of reservations formulated by a State or an international organization, it being understood that such an assessment "has no greater legal effect than that of the act which contains it". While the findings of the treaty body in question are not binding — as is usually the case — the State or international organization must give consideration to this assessment,[2530] but is not obliged to act on it, nor, consequently, to express its intention as indicated in paragraph 4. However, if the matter were referred to a dispute settlement body with decision-making powers,[2531] the Commission is of the view that the author of a reservation deemed to be invalid should make the

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[2529] C. Tomuschat, footnote 1084 above, p. 466; see also second report on reservations to treaties (A/CN.4/477/Add.1); *Yearbook ... 1996*, vol. II (Part One), p. 57, paras. 97 and 99; and D. Müller, "Article 20 (1969)", footnote 1087 above, pp. 809–811, paras. 20–24; and D. Müller, 1969 Vienna Convention Article 20, footnote 1087 above, pp. 496–498, paras. 18–22.

[2530] See guideline 3.2.3 (Consideration of the assessments of treaty monitoring bodies).

[2531] See guideline 3.2.5 (Competence of dispute settlement bodies to assess the permissibility of reservations) and the commentary thereto.

declaration provided for in paragraph 4 as soon as possible and, in any event, within a period of no later than twelve months from the date at which the assessment was made.

(52) Guideline 4.5.3 deliberately refrains from specifying the date on which the treaty enters into force in such a situation. In most cases, this is subject to specific conditions established in the treaty itself.[2532] The concrete effects, including the date on which the treaty enters into force for the author of the invalid reservation, are therefore determined by the relevant provisions of the treaty or, failing any such provision, by treaty law in general[2533] and are not derived specifically from the rules concerning reservations.

(53) Similarly, the Commission is aware that paragraphs 3 and 4 of guideline 4.5.3 leave open the question of precisely when the expression by the author of the reservation of its intention to be bound — or not — by the treaty without the benefit of its reservation produces its effects.

(54) If the author declares that it accepts the application of the treaty without the benefit of the reservation, no real problem arises, and the treaty may be deemed to continue to apply **for the future**, on the understanding that the State or international organization that made the reservation cannot rely on it, **either for the past or for the future**. It is more difficult to respond to the question raised in the previous paragraph if the author of the declaration intends not to be bound by the treaty; in this scenario, it would no doubt be logical for the author to be considered never to have been bound by the treaty, because the nullity (from the outset) of the reservation led the author to choose not to regard itself as bound. However, such a solution might give rise to great practical difficulties in terms of reverting to the situation that existed at the time the State or international organization had expressed its consent to be bound (subject to the reservation).

(55) Since guideline 4.5.3 largely corresponds to the progressive development of international law, it would seem expedient to let practice evolve, although different circumstances might call for different solutions.

4.6 Absence of effect of a reservation on the relations between the other parties to the treaty

A reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

Commentary

(1) Guideline 4.6 reproduces verbatim the text of article 21, paragraph 2, of the Vienna Conventions (the wording of which is identical in the two Conventions).

(2) Pursuant to this provision, treaty relations between the parties to the treaty other than the author of the reservation are not affected by the reservation. This rule of the relativity of legal relations is designed to preserve the normative system applicable as between the other

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[2532] Article 24, paragraph 1, of the 1969 Vienna Convention states: "A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree."

[2533] See article 24, paragraphs 2 and 3, of the 1969 Vienna Convention. These paragraphs state:

> "2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.
>
> "3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides."

parties to the treaty. This is not necessarily the only regime, since the other parties may also make their consent subject to reservations which would then modify their mutual relations as envisaged in paragraph 1 or paragraph 3 of article 21.[2534] Like paragraph 2 of that article, the purpose of guideline 4.6 is not to prevent the multiplication of normative systems that could be established within the same treaty, but only to limit the effects of the reservation to the bilateral relations between its author, on the one hand, and each of the other parties, on the other.[2535]

(3) The scope of the guideline is not limited to "established" reservations, that is, reservations that satisfy the requirements of articles 19, 20 and 23 of the Vienna Conventions,[2536] and the omission is not a drafting inconsistency. Indeed, the principle of the relativity of reservations applies irrespective of the reservation's permissibility or formal validity.[2537]

(4) Furthermore, the acceptance of a reservation or the objections to which it gives rise also have no bearing on the effects of the reservation beyond the bilateral relations between the author of the reservation and each of the other parties. Whether tacit or express, acceptance merely identifies the parties for whom the reservation is considered to be established — those which have accepted the reservation[2538] — in order to distinguish them from parties for whom the reservation does not produce all the effects intended by its author – those which have made an objection to the reservation. However, in relations between all parties other than the author of the reservation, the reservation cannot modify or exclude the legal effects of one or more provisions of the treaty, or of the treaty as a whole, regardless of whether these States or organizations have accepted the reservation or objected to it.

(5) Although article 21, paragraph 2 (and hence guideline 4.6, which uses the same wording), does not mention any limitation or exception, it might be wondered whether the rule of the "relativity of legal relations" is as absolute as this provision indicates.[2539] In any case, Waldock made this point more cautiously in the annex to his first report, entitled "Historical summary of the question of reservations to multilateral conventions": "*in principle*, a reservation only operates in the relations of States with the reserving State".[2540] This then raises the question of whether there are treaties to which the principle of relativity does not apply.

(6) The specific treaties referred to in article 20, paragraphs 2 and 3, are certainly not an exception to the relativity rule. It is true that the relativity of legal relations is, to some extent, limited in the case of these treaties, since by definition the reservation produces its effects in the relations between the author and *all* other parties; however, it has no effect with regard to the other States parties' relations *inter se*, which remain unchanged.

(7) Although, in the case of treaties that must be applied in their entirety, the parties must all give their consent in order for the reservation to produce its effects, this unanimous consent

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[2534] See F. Horn, footnote 25 above, p. 142.

[2535] It is not appropriate here to speak of a "contracting State" or "contracting organization", as guideline 4.6 has no practical effect until the treaty has entered into force.

[2536] See above guideline 4.1 (Establishment of a reservation with regard to another State or organization) and commentary.

[2537] See paragraphs (14) to (28) of the commentary to guideline 4.5.1 above.

[2538] See above guideline 4.1 and commentary.

[2539] R. Szafarz maintains that "[i]t is obvious, of course, that 'the reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*'" (footnote 27 above, p. 311).

[2540] First report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 76, footnote e (emphasis added).

does not, in itself, constitute a modification of the treaty itself as between the parties thereto. Here too, a distinction should therefore be made between two normative systems within the same treaty: the system governing relations between the author of the reservation and each of the other parties, which have, by definition, all accepted the reservation, on the one hand, and the system governing relations between these other parties, on the other. The relations between the other parties remain unchanged.

(8) The same reasoning applies in the case of constituent instruments of international organizations. Although in this case the consent is not necessarily unanimous, it does not in any way modify the treaty relations between parties other than the author of the reservation. The majority system simply imposes on the minority members the position of the majority in respect of the author of the reservation, precisely to avoid the establishment of multiple normative systems within the constituent instrument. But in this case, it is the acceptance of the reservation by the organ of the organization which generalizes the application of the reservation, and probably exclusively in the other parties' relations with the reserving State or organization.

(9) Even in the event of unanimous acceptance of a reservation which is *a priori* invalid,[2541] it is not the reservation which has been "validated" by the consent of the parties that modifies the "general" normative system applicable as between the other parties. Granted, this normative system is modified if — assuming that such a possibility is admitted[2542] — the prohibition of the reservation is lifted or the object and purpose of the treaty are modified (or deemed to be modified) in order to make the reservation valid. Nonetheless, such a modification of the treaty, which has implications for all the parties, arises not from the reservation, but from the unanimous consent of the States and organizations that are parties to the treaty. It is this consent which provides the basis of an agreement to modify the treaty for the purpose of authorizing the reservation within the meaning of article 39 of the Vienna Conventions.[2543]

(10) It should be noted, however, that the parties are still free to modify their treaty relations if they deem it necessary.[2544] This possibility may be deduced *a contrario* from the Commission's commentary to draft article 19 of the 1966 draft articles on the law of treaties (which became article 21 of the 1969 Convention). In the commentary, the Commission stated that a reservation:

> "does not modify the provisions of the treaty for the other parties, *inter se*, since they have not accepted it as a term of the treaty in their mutual relations".[2545]

(11) Moreover, nothing prevents the parties from accepting the reservation as a true clause of the treaty ("negotiated reservations"[2546]) or from changing any other provision of the treaty, if they deem it necessary. However, such a modification can neither result automatically from acceptance of a reservation nor be presumed. The parties must follow the procedures set out for this purpose in the treaty or, in the absence thereof, the procedure established by articles 39 *et seq.* of the Vienna Conventions. In fact, it may become necessary,

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[2541] See paragraphs (9) to (13) of the commentary to guideline 3.3.3.

[2542] The Commission deliberately refrained from adopting a categorical position on this point (see paragraph (13) of the commentary to guideline 3.3.3).

[2543] See paragraphs (10) and (13) of the commentary to guideline 3.3.3.

[2544] F. Horn, footnote 25 above, pp. 142–143.

[2545] *Yearbook ... 1966*, vol. II, p. 209, para. (1).

[2546] See paragraph (10) of the commentary to guideline 1.1.6 (Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of a treaty).

if not indispensable, to modify the treaty in its entirety.[2547] This depends, however, on the circumstances in each case and remains at the discretion of the parties. Consequently, it does not seem indispensable to provide for an exception to the principle established in article 21, paragraph 2, of the Vienna Conventions. In addition, like all the guidelines in the Guide to Practice, guideline 4.6 should be construed to mean "without prejudice to any agreement reached between the parties as to its application".

4.7 Effect of interpretative declarations

Commentary

(1) Despite a long-standing and highly developed practice, neither the Vienna Convention of 1969 nor that of 1986 contains rules concerning interpretative declarations, much less the possible effects of such a declaration.[2548]

(2) The *travaux préparatoires* to the Conventions explain this absence. While the problem of interpretative declarations was completely overlooked by the first special rapporteurs,[2549] Waldock[2550] was aware both of the practical difficulties such declarations created, and of the solution, a very simple solution, required. Indeed, several Governments referred in their comments to the draft articles adopted on first reading, not just to the absence of interpretative declarations and to the distinction that should be drawn between such declarations and reservations,[2551] but also to the elements to be taken into account when interpreting a treaty.[2552] In 1965, the Special Rapporteur made an effort to reassure those States by affirming that the question of interpretative declarations had not escaped the notice of the Commission. Waldock continued:

[2547] Such a situation may occur, *inter alia*, in commodity treaties, in which even the principle of reciprocity cannot restore the balance between the parties (H.G. Schermers, footnote 2155 above, p. 356). Article 64, paragraph 2 (c), of the 1968 International Sugar Agreement seemed to provide for the possibility of adapting provisions the application of which had been compromised by the reservation: "In any other instance where reservations are made [that is, in cases where the reservation concerns the economic operation of the Agreement], the Council shall examine them and decide, by special vote, whether they are to be accepted *and, if so, under what conditions*. Such reservations shall become effective only after the Council has taken a decision on the matter" (emphasis added). See also P.-H. Imbert, footnote 25 above, p. 250; and F. Horn, footnote 25 above, pp. 142–143.

[2548] See paragraph (1) of the commentary to guideline 1.2.

[2549] Fitzmaurice limited himself to specifying that the term "reservation" "does not include mere statements as to how the State concerned proposes to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty" (first report on the law of treaties (A/CN.4/101), *Yearbook ... 1956*, vol. II, p. 10).

[2550] In his definition of the term "reservation", Waldock explained that "an explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation" (first report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, pp. 31–32).

[2551] See in particular the comments of the Japanese Government summarized in Sir Humphrey Waldock's fourth report on the law of treaties (A/CN.4/177 and Add.1 and 2), *Yearbook ... 1965*, vol. II, p. 49 and the comment of the British Government that "article 18 deals only with reservations and assumes that the related question of statements of interpretation will be taken up in a later report" (*ibid.*).

[2552] See the comments of the United States of America on draft articles 69 and 70 concerning interpretation, summarized in Sir Humphrey Waldock's sixth report on the law of treaties (A/CN.4/183 and Add.1 to 4), *Yearbook ... 1966*, vol. II, p. 93.

> "Interpretative declarations, however, remained a problem, and possibly also statements of policy made in connection with a treaty. The question was what the effect of such declarations and statement should be. Some rules which touched the subject were contained in article 69, particularly its paragraph 3 on the subject of agreement between the parties regarding the interpretation of the treaty and of the subsequent practice in its application. Article 70, which dealt with further means of interpretation, was also relevant."[2553]

(3) Contrary to the positions expressed by some members of the Commission,[2554] the effect of an interpretative declaration "was governed by the rules on interpretation".[2555] Although "[i]nterpretative statements are certainly important, (...) it may be doubted whether they should be made the subject of specific provisions; for the legal significance of an interpretative statement must always depend on the particular circumstances in which it is made".[2556]

(4) At the Vienna Conference of 1968–1969, the question of interpretative declarations was debated once again, in particular in connection with a Hungarian amendment to the definition of the term "reservation"[2557] and to article 19 (which became article 21) concerning the effects of a reservation.[2558] The effect of this amendment would have been to assimilate interpretative declarations to reservations, without making any distinction between the two categories, in particular with regard to their respective effects. Several delegations were nevertheless clearly opposed to such an assimilation.[2559] Waldock, in his capacity as Expert Consultant, had

> "issued a warning against the dangers of the addition of interpretative declarations to the concept of reservations. In practice, a State making an interpretative declaration

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[2553] *Yearbook ... 1965*, vol. I, 799th meeting, 10 June 1965, p. 165, para. 13. See also Sir Humphrey Waldock's fourth report on the law of treaties (A/CN.4/177 and Add.1 and 2), *Yearbook ... 1965*, vol. II, p. 49, para. 2.

[2554] See the comments of Verdross (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, p. 151, para. 37, and 799th meeting, 10 June 1965, p. 166, para. 23) and Ago (*ibid.*, 798th meeting, 9 June 1965, p. 162, para. 76). See also Castrén (*ibid.*, 799th meeting, 10 June 1965, p. 166, para. 30) and Bartos (*ibid.*, para. 29).

[2555] *Yearbook ... 1965*, vol. I, 799th meeting, 10 June 1965, p. 165, para. 14. See also Sir Humphrey Waldock's fourth report on the law of treaties (A/CN.4/177 and Add.1 and 2), *Yearbook ... 1965*, vol. II, p. 49, para. 2 ("Statements of interpretation were not dealt with by the Commission in the present section for the simple reason that *they are not reservations and appear to concern the interpretation rather than the conclusion of treaties*") (emphasis added).

[2556] *Ibid.*

[2557] A/CONF.39/C.1/L.23, *Documents of the Conference*, footnote 54 above, p. 112, para. 35 (vi) (e). The Hungarian delegation proposed the following text: "'Reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, acceding to, accepting or approving a *multilateral* treaty, whereby it purports to exclude, to vary *or to interpret* the legal effect of certain provisions of the treaty in their application to that State" (emphasis in the original).

[2558] A/CONF.39/C.1/L.177, *ibid.*, p. 140, para. 199 (ii) (d) and (iii). See also the explanations provided at the Conference, in *First session, Summary records*, footnote 35 above, 25th meeting, 16 April 1968, p. 137, paras. 52–53.

[2559] See in particular the position of Australia (A/CONF.39/11), *ibid.*, 5th meeting, 29 March 1968, p. 29, para. 81, Sweden (*ibid.*, p. 30, para. 102), the United States of America (*ibid.*, 6th meeting, p. 31, para. 116) and the United Kingdom (*ibid.*, 25th meeting, 16 April 1968, p. 137, para. 60).

> usually did so because it did not want to become enmeshed in the network of the law on reservations".[2560]

Consequently, he appealed

> "to the Drafting Committee to bear the delicacy of the question in mind and not to regard the assimilation of interpretative declarations to reservations as an easy matter".[2561]

In the end, the Drafting Committee did not retain the Hungarian amendment. Although Mr. Sepúlveda-Amor, on behalf of Mexico, had drawn attention to "the absence of a definition of the instrument envisaged in paragraph 2 (b) of article 27 [which became article 31]", while "interpretative declarations of that type were common in practice"[2562] and suggested that "it was essential to set forth clearly the legal effects of such declarations, as distinct from those of actual reservations",[2563] no provisions of the Vienna Convention were devoted specifically to interpretative declarations. Waldock's conclusions regarding the effects of such declarations[2564] were thus confirmed by the work of the Conference.

(5) Neither the *travaux* of the Commission nor those of the Vienna Conference of 1986 have further elucidated the question of the concrete effects of an interpretative declaration.

(6) Here, too, the Commission has found itself obliged to fill a gap in the Vienna Conventions and has done so in section 4.7 of the Guide to Practice while endeavouring to remain faithful to the logic of the Conventions and, in particular, of their articles 31 and 32 on the interpretation of treaties.

4.7.1 Clarification of the terms of the treaty by an interpretative declaration

1. An interpretative declaration does not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to certain provisions thereof and may, as appropriate, constitute an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties.

2. In interpreting the treaty, account shall also be taken, as appropriate, of the approval of, or opposition to, the interpretative declaration, by other contracting States or contracting organizations.

Commentary

(1) The absence of a specific provision in the Vienna Conventions concerning the legal effects that an interpretative declaration[2565] is likely to produce does not mean, however, that they contain no indications on the matter, as the comments made during their elaboration will show.[2566]

[2560] *Ibid.*, p. 137, para. 56.

[2561] *Ibid.*

[2562] *Ibid.*, 21st meeting, 10 April 1968, p. 113, para. 62.

[2563] *Ibid.*

[2564] See above paragraph (2) of this introductory commentary.

[2565] See the introductory commentary to section 4.7 of the Guide to Practice.

[2566] See paragraph (2) of the introductory commentary to section 4.7.

(2) As their name clearly indicates, their object and function consist in proposing an interpretation of the treaty.[2567] Consequently, in accordance with the definition retained by the Commission:

> "Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.[2568]

(3) To specify or clarify the provisions of a treaty is precisely to interpret the treaty, which is why the Commission used those terms to define interpretative declarations.[2569] Although, as the commentary to guideline 1.2 (Definition of interpretative declarations) makes clear, the definition "in no way prejudges the validity or the effect of such declarations",[2570] it seems almost self-evident that the effect of an interpretative declaration is essentially produced through the highly complex process of interpretation.

(4) Before considering the role that such a declaration may play in the interpretation process, it is useful to specify the effect that it may definitely not produce. It is clear from the comparison between the definition of interpretative declarations and that of reservations that, whereas the latter are intended to modify the legal effect of the treaty or exclude certain of its provisions in their application to the author of the reservation, the former have no aim other than to specify or clarify the meaning. The author of an interpretative declaration does not seek to relieve itself of its international obligations under the treaty; it intends to give a particular meaning to those obligations. As Yasseen clearly explained:

> "A State which formulated a reservation recognized that the treaty had, generally speaking, a certain force; but it wished to vary, restrict or extend one or several provisions of the treaty insofar as the reserving State itself was concerned.
>
> "A State making an interpretative declaration declared that, in its opinion, the treaty or one of its articles should be interpreted in a certain manner; it attached an objective and general value to that interpretation. In other words, it considered itself bound by the treaty and wished, as a matter of conscience, to express its opinion concerning the interpretation of the treaty."[2571]

(5) If the effect of an interpretative declaration consisted in modifying the treaty, it would actually constitute a reservation, not an interpretative declaration. The Commission's commentary to article 2, paragraph 1 (d), of its 1966 draft articles describes this dialectic unequivocally:

> "States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted."[2572]

[2567] See paragraph (16) of the commentary to guideline 1.2.

[2568] Guideline 1.2 (Definition of interpretative declarations).

[2569] See paragraph (18) of the commentary to guideline 1.2 (Definition of interpretative declarations).

[2570] Paragraph (33) of the commentary to guideline 1.2.

[2571] *Yearbook ... 1965*, vol. I, 799th meeting, 10 June 1965, p. 166, paras. 25–26.

[2572] *Yearbook ... 1966*, vol. II, pp. 189–190, paragraph (11) of the commentary. See also Sir Humphrey Waldock's explanations, *Yearbook ... 1965*, vol. I, 799th meeting, p. 165, para. 14

(6) The International Court of Justice has also maintained that the interpretation of a treaty may not lead to its modification. As it held in its advisory opinion concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*: "It is the duty of the Court to interpret the Treaties, not to revise them."[2573]

(7) It may be deduced from the foregoing that an interpretative declaration may in no way modify "the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects".[2574] Whether or not the interpretation is correct, its author remains bound by the provisions of the treaty. This is certainly the meaning to be given to the *dictum* of the European Commission of Human Rights in the *Belilos* case, in which the Commission held that an interpretative declaration

> "may be taken into account when an article of the Convention is being interpreted; but if the Commission or the Court reached a different interpretation, the State concerned would be bound by that interpretation".[2575]

(8) In other words, a State (or an international organization) may not escape the risk of violating its international obligations by basing itself on an interpretation that it put forward unilaterally. In the case where the State's interpretation does not correspond to the "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose",[2576] the conduct adopted by the author of the declaration in the implementation of the treaty runs a serious risk of violating its treaty obligations.[2577]

(9) If a State or international organization has made its interpretation a condition for its consent to be bound by the treaty, by formulating a conditional interpretative declaration within the meaning of guideline 1.4 (Conditional interpretative declarations), the situation is slightly different. Of course, if the interpretation proposed by the author of the declaration and the interpretation of the treaty given by a competent third party[2578] are in agreement, there is no problem: the interpretative declaration remains merely interpretative and may play the

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("[T]he crucial point was that, if the interpretative declaration constituted a reservation, its effect would be determined by reference to the provisions of articles 18 to 22. In that event, consent would operate, but in the form of rejection or acceptance of the reservation by other interested States. If, however, the declaration did not purport to vary the legal effect of some of the treaty's provisions in its application to the State making it, then it was interpretative and was governed by the rules on interpretation").

[2573] Advisory opinion of 18 July 1950, *I.C.J. Reports 1950*, p. 229. See also the judgment of 27 August 1952, *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, *I.C.J. Reports 1952*, p. 196, and the judgment of 18 July 1966 in *South West Africa (Liberia v. South Africa)*, and *South West Africa (Ethiopia v. South Africa)*, *I.C.J. Reports 1966*, p. 48, para. 91.

[2574] Paragraph 2 of guideline 1.1 (Definition of reservations).

[2575] Report of 7 May 1986, vol. 1, No. 32, para. 102.

[2576] Article 31, paragraph 1, of the Vienna Conventions.

[2577] See also D.M. McRae, footnote 129 above, p. 161; M. Heymann, footnote XXX above, p. 126; or F. Horn, footnote 25 above, p. 326.

[2578] It is hardly likely that the "authentic" interpretation of the treaty (that is, the one agreed by all the parties) will differ significantly from that put forward by the author of the interpretative declaration: by definition, an authentic interpretation arises from the parties themselves (see Jean Salmon (ed.), *Dictionnaire de droit international public*, footnote 1016 above, p. 604: "*Interprétation émise par l'auteur ou par l'ensemble des auteurs de la disposition interprétée – notamment, pour un traité, par toutes les parties –, selon des formes telles que son autorité ne puisse être contestée*" [An interpretation issued by the author or by all the authors of the provision being interpreted — in the case of a treaty, by all the parties — in due form so that its authority may not be questioned].

same role in the process of interpreting the treaty as that of any other interpretative declaration. If, however, the interpretation of the author of the interpretative declaration does not correspond to the interpretation of the treaty objectively established (following the rules of the Vienna Conventions) by a third party, a problem arises: the author of the declaration does not intend to be bound by the treaty as it has thus been interpreted, but only by the treaty text as interpreted and applied in the manner which it has proposed. It has therefore made its consent to be bound by the treaty dependent upon a particular "interpretation" which — *ex hypothesi* — does not fall within the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In this case — but in this case only — the conditional interpretative declaration produces the effects of a reservation, if the corresponding conditions have been met. This eventuality, which is not merely hypothetical, explains why such an interpretative declaration, although not intended under its terms to modify the treaty, must nonetheless be subject to the same legal regime that applies to reservations.[2579] As has been emphasized:

> "Since the declaring State is maintaining its interpretation regardless of the true interpretation of the treaty, it is purporting to exclude or to modify the terms of the treaty. Thus, the consequences attaching to the making of reservations should apply to such a declaration."[2580]

(10) In the case of a simple interpretative declaration, however, the fact of proposing an interpretation which is not in accordance with the provisions of the treaty in no way changes the position of its author with regard to the treaty, who remains bound by it and must respect it. This position is also that of McRae:

> "The State has simply indicated its view of the interpretation of the treaty, which may or may not be the one that will be accepted in any arbitral or judicial proceedings. In offering this interpretation the State has not ruled out subsequent interpretative proceedings nor has it ruled out the possibility that its interpretation will be rejected. Provided, therefore, that the State making the reservation still contemplates an ultimate official interpretation that could be at variance with its own view, there is no reason for treating the interpretative declaration in the same way as an attempt to modify or to vary the treaty."[2581]

(11) Although an interpretative declaration does not affect the normative force and binding character of the obligations contained in the treaty, it may still produce legal effects or play a role in interpreting those obligations. As the Commission noted during its consideration of the permissibility of interpretative declarations,[2582] "*[e]n vertu de sa souveraineté, chaque État a le droit d'indiquer le sens qu'il donne aux traités auxquels il est partie, en ce qui concerne*" [on the basis of its sovereignty, every State has the right to indicate its own understanding of the treaties to which it is party].[2583] This reflects a necessity: those to whom a legal rule is addressed must necessarily interpret it in order to apply it and meet their obligations.[2584]

[2579] See paragraphs (13) to (14) of the commentary to guideline 1.4.

[2580] D.M. McRae, footnote 129 above, p. 161. See also M. Heymann, footnote 147 above, pp. 147–148. Ms. Heymann is of the view that a conditional interpretative declaration must be treated as a reservation only in the case where the treaty creates a body competent to provide an authentic interpretation. In other cases, she considers that the conditional interpretative declaration may never modify the treaty provisions (*ibid.*, pp. 148–150).

[2581] D.M. McRae, footnote 129 above, p. 160.

[2582] See paragraph (13) of the introductory commentary to guideline 3.5.

[2583] P. Daillier, M. Forteau and A. Pellet, footnote 254 above, p. 277.

[2584] G. Abi-Saab, "'Interprétation' et 'auto-interprétation': quelques réflexions sur leur rôle dans la

(12) Interpretative declarations are above all an expression of the parties' concept of their international obligations under the treaty. They are a means of determining the intention of the contracting States or contracting organizations with regard to their treaty obligations. It is in this connection, as an element relating to the interpretation of the treaty, that case law[2585] and the literature have affirmed the need to take into account interpretative declarations in the treaty process. McRae puts it this way:

> "In fact, it is here that the legal significance of an interpretative declaration lies, for it provides evidence of intention in the light of which the treaty is to be interpreted."[2586]

(13) According to another view, on the one hand, an interpretation which is not accepted or is accepted only by certain parties cannot constitute an element of interpretation under article 31 of the Vienna Convention; and on the other hand: "*Das schließt aber nicht aus, dass sie unter Umständen als Indiz für einen gemeinen Parteiwillen herangezogen werden könnte*"[2587] [That does not exclude the possibility, however, that it may be used, under certain conditions, as an indication of the common intention of the parties.]

(14) The French Constitutional Council shares this view and has clearly limited the object and role of an interpretative declaration by the French Government solely to the interpretation of the treaty: "Whereas, moreover, the French Government has accompanied its signature with an interpretative declaration in which it specifies the meaning and scope which it intends to give to the Charter or to some of its provisions with regard to the Constitution, such unilateral declaration shall have normative force only in that it constitutes an instrument connected with the treaty and may contribute, in the case of a dispute, to its interpretation."[2588]

(15) Paragraph 1 of guideline 4.7.1 takes up these two ideas in order to clarify, on the one hand, that an interpretative declaration has no impact on the rights and obligations under the treaty and, on the other, that it produces its effects only in the process of interpretation.

(16) Because of the very nature of the operation of interpretation — which is a process, an art rather than an exact science[2589] — it is not possible in a general and abstract manner to assess the value of an interpretation other than by referring to the "general rule of interpretation" which is set out in article 31 of the Vienna Conventions on the Law of Treaties and which cannot be called into question or "revisited" in the context of the present exercise.[2590] Therefore, in the Guide to Practice, the problem must necessarily be limited to the question of the authority of an interpretation proposed in an interpretative declaration and the question of its probative value for any third party interpreter, that is, its place and role in the process of interpretation.

(17) With regard to the first question — the authority of the interpretation proposed by the author of an interpretative declaration — it should be recalled that, according to the definition

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formation et la résolution du différend international", in *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht: Festschrift für Rudolf Bernhardt* (Berlin, Springer, 1995), p. 14.

[2585] See footnote 1575 above.

[2586] D.M. McRae, footnote 129 above, p. 169.

[2587] M. Heymann, footnote 147 above, p. 135.

[2588] Constitutional Council, Decision No. 99-412 DC, 15 June 1999, *European Charter for Regional or Minority Languages, Official Gazette of the French Republic*, 18 June 1999, p. 8964, para. 4.

[2589] See paragraphs (11) and (12) of the commentary to guideline 3.5.

[2590] This is the reason why the final phrase in paragraph 1 of guideline 4.7.1, recalling the title of article 31 of the Vienna Conventions, refers to "the general rule of interpretation of treaties", without going into detail on its complex ramifications.

of interpretative declarations, they are unilateral statements.[2591] The interpretation that such a statement proposes, therefore, is itself only a unilateral interpretation which, as such, has no particular value and certainly cannot bind the other parties to the treaty. This common-sense principle was affirmed as far back as Vattel:

> "Neither the one nor the other of the parties interested in the contract has a right to interpret the deed or treaty according to his own fancy."[2592]

(18) During the discussion on draft article 70 (which became article 31 of the 1969 Vienna Convention) containing the general rule of interpretation, Rosenne expressed the view

> "that a situation might arise where, for instance, there might be a unilateral understanding on the meaning of a treaty by the United States Senate that was not always accepted by the other side. A purely unilateral interpretative statement of that kind made in connection with the conclusion of a treaty could not bind the parties".[2593]

(19) The Appellate Body of the World Trade Organization has expressed the same idea as follows:

> "The purpose of treaty interpretation under article 31 of the Vienna Convention is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of *one* of the parties to a treaty."[2594]

(20) Since the declaration expresses only the unilateral intention of the author — or, if it has been approved by some of the parties to the treaty, at best a shared intention[2595] — it certainly cannot be given an objective value that is opposable *erga omnes*, much less the value of an authentic interpretation accepted by all the parties.[2596] Although it does not determine the meaning to be given to the terms of the treaty, it nonetheless affects the process of interpretation to some extent.

(21) However, it is difficult to determine precisely on what basis an interpretative declaration would be considered an element in interpretation under articles 31 and 32 of the

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[2591] Report of the International Law Commission on the work of its fifty-first session, *Yearbook … 1999*, vol. II, Part Two, pp. 103–109.

[2592] E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (Washington, Carnegie Institution of Washington, 1916), Part II, p. 462, para. 265.

[2593] *Yearbook … 1964*, vol. I, 769th meeting, 17 July 1964, p. 313, para. 52.

[2594] Decision of 5 June 1998, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62-67-68/AB/R, para. 84 (emphasis in the original) (also available on the World Trade Organization website: http://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm).

[2595] M. Heymann has explained in this regard: "*Wird eine einfache Interpretationserklärung nur von einem Teil der Vertragsparteien angenommen, ist die* interprétation partagée *kein selbständiger Auslegungsfaktor im Sinne der [Wiener Vertragsrechtskonvention]. Dies liegt daran, dass bei der Auslegung eines Vertrags die Absichten aller Vertragsparteien zu berücksichtigen sind und die* interprétation partagée *immer nur den Willen einer mehr oder weniger großen Gruppe von Vertragsparteien zum Ausdruck bringt*" [If a simple interpretative declaration is accepted by only some of the parties to the treaty, the *interprétation partagée* does not constitute an independent element of interpretation in the sense of the [Vienna Convention on the Law of Treaties]. This is because, when the treaty is interpreted, the intentions of all the parties must be taken into account, while the *interprétation partagée* expresses only the will of a more or less large group of parties] *Einseitige Interpretationserklärungen zu multilateralen Verträgen* (footnote 147 above, p. 135, footnote omitted).

[2596] Concerning this hypothesis, see guideline 4.7.3 and commentary below.

Vienna Conventions. In his day, Waldock, in a particularly cautious manner, had allowed for the persistence of some uncertainty on the matter:

> "Statements of interpretation were not dealt with by the Commission in the present action for the simple reason that they are not reservations and appear to concern the interpretation rather than the conclusion of treaties. In short, they appear rather to fall under articles 69–71. These articles provide that the "context of the treaty, for the purposes of its interpretation", is to be understood as comprising "any agreement or instrument related to the treaty and reached or drawn up in connection with its conclusion" (art. 69, para. 2); that "any agreement between the parties regarding the interpretation of the treaty" and "any subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation" are to be taken into account "together with the context" of the treaty for the purposes of its interpretation (art. 69, para. 3); that as "further means of interpretation" recourse may be had, *inter alia*, to the "preparatory work of the treaty and the circumstances of its conclusion" (art. 70); and that a meaning other than its ordinary meaning may be given to a term if it is established conclusively that the parties intended the term to have that special meaning. Any of these provisions may come into play in appreciating the legal effect of an interpretative declaration in a given case. (...) In the view of the Special Rapporteur the Commission was entirely correct in deciding that the matter belongs under articles 69–71 rather than under the present section (...)."[2597]

(22) Whether interpretative declarations are regarded as one of the elements to be taken into consideration in the interpretation of the treaty essentially depends on the context of the declaration and the assent of the other States parties. But it is particularly noteworthy that, in 1966, the Special Rapporteur very clearly refused to include unilateral declarations or agreements *inter partes* in the "context", even though the United States had suggested doing so by means of an amendment. The Special Rapporteur explained that only a degree of assent by the other parties to the treaty would have made it possible to include declarations or agreements *inter partes* in the interpretative context:

> "As to the substance of paragraph 2, (...) the suggestion of the United States Government that it should be made clear whether the 'context' includes (1) a unilateral document and (2) a document on which several but not all of the parties to a multilateral instrument have agreed raises problems both of substance and of drafting which the Commission was aware of in 1964 but did not find it easy to solve at the sixteenth session. (...) But it would seem clear on principle that a unilateral document cannot be regarded as part of the 'context' for the purpose of interpreting a treaty, unless its relevance for the interpretation of the treaty or for determining the conditions of the particular State's acceptance of the treaty is acquiesced in by the other parties. Similarly, in the case of a document emanating from a group of the parties to a multilateral treaty, principle would seem to indicate that the relevance of the document in connection with the treaty must be acquiesced in by the other parties. Whether a 'unilateral' or a 'group' document forms part of the context depends on the particular circumstances of each case, and the Special Rapporteur does not think it advisable that

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[2597] Fourth report on the law of treaties (A/CN.4/177 and Add.1 and 2), *Yearbook ... 1965*, vol. II, p. 49, para. 2 (observations of the Special Rapporteur on draft articles 18, 19 and 20 (footnotes omitted)).

> the Commission should try to do more than state the essential point of the principle – the need for express or implied assent."[2598]

(23) Sapienza also concludes that interpretative declarations which have not been approved by the other parties do not fall under article 31, paragraph 2 (b), of the Vienna Conventions:

> "*In primo luogo, ci si potrebbe chiedere quale significato debba attribuirsi all'espressione 'accepté par les autres parties en tant qu'instrument ayant rapport au traité'. Deve intendersi nel senso che l'assenso delle altre parti debba limitarsi al fatto che lo strumento in questione possa ritenersi relativo al trattato o, invece, nel senso che debba estendersi anche al contenuto dell'interpretazione? Ci pare che l'alternativa non abbia, in realtà, motivo di porsi, dato che il paragrafo 2 afferma che dei documenti in questione si terrà conto 'ai fini dell'interpretazione'. Dunque, l'accettazione delle altre parti nei confronti degli strumenti di cui alla lettera (b) non potrà che essere un consenso a che l'interpretazione contenuta nella dichiarazione venga utilizzata nella ricostruzione del contenuto normativo delle disposizioni convenzionali cui afferisce, anche nei confronti degli altri Stati.*"[2599] [First, it could be asked what meaning should be given to the phrase "accepted by the other parties as an instrument related to the treaty". Does it mean that the assent of the other parties should be limited to the fact that the instrument in question could be considered to be related to the treaty or should it be understood as extending to the content of the interpretation? It seems that, in fact, the alternative should not be considered, since paragraph 2 states that the instruments in question will be taken into account "for the purpose of the interpretation". Consequently, acceptance by the other parties of the instruments referred to in subparagraph (b) can only be consent to the use of the interpretation contained in the declaration for the reconstruction of the normative content of the treaty provisions in question, even with respect to other States.]

(24) Nonetheless, although at first glance such interpretative declarations do not seem to fall under articles 31 and 32 of the Vienna Conventions, they still constitute the (unilateral) expression of the intention of one of the parties to the treaty and may, on that basis, play a role in the process of interpretation.

(25) In its advisory opinion on the *International Status of South-West Africa*, the International Court of Justice noted, on the subject of the declarations of the Union of South Africa regarding its international obligations under the Mandate:

> "These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government. Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument. In this case the declarations of the Union of South Africa support the conclusions already reached by the Court."[2600]

[2598] Sir Humphrey Waldock, sixth report on the law of treaties (A/CN.4/186 and Add.1–7), *Yearbook ... 1966*, vol. II, p. 98, para. 16.

[2599] R. Sapienza, footnote 129 above, pp. 239–240. See also R. Jennings and A. Watts, *Oppenheim's International Law*, vol. I, 1992, p. 1268 ("An interpretation agreed between some only of the parties to a multilateral treaty may, however, not be conclusive, since the interests and intentions of the other parties may have to be taken into consideration").

[2600] Advisory opinion of 11 July 1950, *International Status of South-West Africa, I.C.J. Reports 1950*, pp. 135–136.

(26) The Court thus clarified that declarations by States relating to their international obligations have "probative value" for the interpretation of the terms of the legal instruments to which they relate, but that they corroborate or "support" an interpretation that has already been determined by other methods. In this sense, an interpretative declaration may therefore confirm an interpretation that is based on the objective elements listed in articles 31 and 32 of the Vienna Conventions.

(27) In the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*,[2601] the Court was again seized with the question as to the value of an interpretative declaration. In signing and ratifying the United Nations Convention on the Law of the Sea, Romania formulated the following interpretative declaration:

> "Romania states that according to the requirements of equity as it results from Articles 74 and 83 of the Convention on the Law of the Sea, the uninhabited islands without economic life can in no way affect the delimitation of the maritime spaces belonging to the mainland coasts of the coastal States."[2602]

In its Judgment, however, the Court merely noted the following with respect to the Romanian declaration:

> "Finally, regarding Romania's declaration [...], the Court observes that under Article 310 of UNCLOS, a State is not precluded from making declarations and statements when signing, ratifying or acceding to the Convention, provided these do not purport to exclude or modify the legal effect of the provisions of UNCLOS in their application to the State which has made a declaration or statement. The Court will therefore apply the relevant provisions of UNCLOS as interpreted in its jurisprudence, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. Romania's declaration as such has no bearing on the Court's interpretation."[2603]

(28) The wording is rather peremptory and seems to cast serious doubt on the utility of interpretative declarations. It seems to suggest that the declaration has "no bearing" on the interpretation of the provisions of the Montego Bay Convention that the Court has been asked to make. However, the use of the expression "as such" allows one to shade this radical observation: while the Court does not consider itself bound by the unilateral interpretation proposed by Romania, that does not preclude the unilateral interpretation from having an effect as a means of proof or an element that might corroborate the Court's interpretation "in accordance with Article 31 of the Vienna Convention on the Law of Treaties".

(29) The Strasbourg Court took a similar approach. After the European Commission of Human Rights, which had already affirmed that an interpretative declaration "may be taken into account when an article of the Convention is being interpreted",[2604] the Court chose to take the same approach in the case of *Krombach v. France*, namely, that interpretative declarations may confirm an interpretation derived on the basis of the relevant rules. Thus, in order to respond to the question of whether the higher court in a criminal case may be limited to a review of points of law, the Court first examined State practice, then its own case law in the matter and ultimately cited a French interpretative declaration:

[2601] Judgment of 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *I.C.J. Reports 2009*, p. 61.

[2602] *Multilateral Treaties* ..., chap. XXI.6.

[2603] Judgment of 3 February 2009, footnote 2602 above, p. 78, para. 42.

[2604] See footnote 2575 above.

> "The Court reiterates that the Contracting States dispose in principle of a wide margin of appreciation to determine how the right secured by Article 2 of Protocol No. 7 to the Convention is to be exercised. Thus, the review by a higher court of a conviction or sentence may concern both points of fact and points of law or be confined solely to points of law. Furthermore, in certain countries, a defendant wishing to appeal may sometimes be required to seek permission to do so. However, any restrictions contained in domestic legislation on the right to a review mentioned in that provision must, by analogy with the right of access to a court embodied in Article 6 § 1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right (see *Haser v. Switzerland* (dec.), No. 33050/96, 27 April 2000, unreported). This rule is in itself consistent with the exception authorized by paragraph 2 of Article 2 and is backed up by the French declaration regarding the interpretation of the Article, which reads: '... in accordance with the meaning of Article 2, paragraph 1, the review by a higher court may be limited to a control of the application of the law, such as an appeal to the Supreme Court'."[2605]

(30) States, too, put forward their interpretative declarations in this subdued manner. Thus, the argument by the Agent for the United States in the case concerning *Legality of Use of Force (Yugoslavia v. United States of America)* was tangentially based on the interpretative declaration made by the United States to article II of the Genocide Convention of 1948 in order to demonstrate that *mens rea specialis* is an essential element in characterizing an act of genocide:

> "[T]he need for a demonstration in such circumstances of the specific intent required by the Convention was made abundantly clear by the United States Understanding at the time of the United States ratification of the Convention. That Understanding provided that 'acts in the course of armed conflicts committed without the specific intent required by Article II are not sufficient to constitute genocide as defined by this Convention'. The Socialist Federal Republic of Yugoslavia did not object to this Understanding, and the Applicant made no attempt here to take issue with it."[2606]

(31) It is therefore clear from practice and doctrinal analyses that interpretative declarations come into play only as an auxiliary or complementary means of interpretation corroborating a meaning revealed by the terms of the treaty, considered in the light of its object and purpose. As such, they do not produce an autonomous effect: when they have an effect at all, interpretative declarations are associated with another instrument of interpretation, which they usually uphold.

(32) The interpreter can thus rely on interpretative declarations to confirm his conclusions regarding the interpretation of a treaty or a provision of it. Interpretative declarations constitute the expression of a subjective element of interpretation — the intention of one of the States parties — and, as such, may confirm "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The phrase "as appropriate" that appears in both paragraph 1 and paragraph 2 of guideline 4.7.1 is meant to emphasize that interpretative declarations (and reactions to them) are taken into consideration on the basis of individual circumstances.

(33) In that same vein, and as guideline 4.7.1, paragraph 2 stresses, the reactions (approval or opposition) that may have been expressed with regard to the interpretative declaration by

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[2605] European Court of Human Rights, Judgment of 13 February 2001, *Krombach v. France*, Application No. 29731/9, para. 96.

[2606] Report 1999/35, 12 May 1999, pp. 1–2 (Mr. Andrews).

the other parties — all of them potential interpreters of the treaty as well — should also be taken into consideration. An interpretative declaration that has been approved by one or more States certainly has greater probative value as to the intention of the parties than an interpretative declaration to which there has been opposition.[2607]

4.7.2 Effect of the modification or the withdrawal of an interpretative declaration

The modification or the withdrawal of an interpretative declaration may not produce the effects provided for in guideline 4.7.1 to the extent that other contracting States or contracting organizations have relied upon the initial declaration.

Commentary

(1) Despite the auxiliary role to which interpretative declarations are confined under guideline 4.7.1, it should be recalled that they are unilateral statements expressing their author's intention to adhere to a given interpretation of the provisions of the treaty. Accordingly, although the declaration in itself does not create rights and obligations for its author or for the other parties to the treaty, it may prevent its author from taking a position contrary to that expressed in its declaration. It does not matter whether or not this phenomenon is called estoppel;[2608] in any case it is a corollary of the principle of good faith[2609] in its international relations, a State cannot blow hot and cold. It cannot declare that it interprets a given provision of the treaty in one way and then take the opposite position

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[2607] D.M. McRae, footnote 129 above, pp. 169–170.

[2608] As Judge Alfaro explained in the important separate opinion he attached to the Court's second judgment in the case concerning the *Temple of Preah Vihear (Cambodia v. Thailand)*, "whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*). Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (*nemo potest mutare consilium suum in alterius injuriam*). (...) Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right (*venire contra factum proprium non valet*)" (*I.C.J. Reports 1962*, p. 40). See also the Permanent Court of International Justice, Judgment of 12 July 1920, *Serbian loans, Series A, No. 20*, pp. 38–39; International Court of Justice, Judgment of 20 February 1969 (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), I.C.J. Reports 1969*, p. 26, para. 30; Judgment of 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 415, para. 51; or Judgment of 13 September 1990, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Request by Nicaragua for Permission to Intervene, I.C.J. Reports 1990*, p. 118, para. 63.

[2609] See the International Court of Justice, Judgment of 12 October 1984, *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), I.C.J. Reports 1984*, p. 305, para. 130. The legal literature is in agreement on this point. Thus, as D. Bowett explained more than a half-century ago, the *raison d'être* of estoppel lies in the principle of good faith: "The basis of the rule is the general principle of good faith and as such finds a place in many systems of law" ("Estoppel before international tribunals and its relation to acquiescence", *British Year Book of International Law*, vol. 33 (1957), p. 176 (footnotes omitted)). See also A. Pellet and J. Crawford, "Aspects des modes continentaux et anglo-saxons de plaidoiries devant la C.I.J.", in *International Law between Universalism and Fragmentation-Festschrift in Honour of Gerhard Hafner* (Leiden/Boston, Nijhoff, 2008), pp. 831–867.

before an international judge or arbitrator, at least if the other parties have relied on it. As indicated by principle 10 of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, adopted in 2006 by the International Law Commission:

> "A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to:
>
> (...) (b) The extent to which those to whom the obligations are owed have relied on such obligations."[2610]

(2) It should not be inferred from the above that the author of an interpretative declaration is bound by the interpretation it puts forward – which might ultimately prove unfounded. The validity of the interpretation depends on other circumstances and can be assessed only under the rules governing the interpretation process. In this context, Bowett presents a sound analysis:

> "The estoppel rests on the representation of fact, whereas the conduct of the parties in construing their respective rights and duties does not appear as a representation of fact so much as a representation of law. The interpretation of rights and duties of parties to a treaty, however, should lie ultimately with an impartial international tribunal and it would be wrong to allow the conduct of the parties in interpreting these rights and duties to become a binding interpretation on them."[2611]

(3) It should be recalled that under guidelines 2.4.8 (Modification of an interpretative declaration) and 2.5.12 (Withdrawal of an interpretative declaration), the author of an interpretative declaration is free to modify or withdraw it at any time. Depending on the circumstances, the withdrawal or modification of an interpretative declaration may be of some relevance to the interpretation of the treaty to which it relates. However, the Commission decided not to make express mention of these two provisions because they relate to procedural rules, whereas guideline 4.7.2 is included in the section of the Guide to Practice concerning the effects of interpretative declarations.

(4) Like the author of an interpretative declaration, any State or international organization that has approved this declaration is bound by the same principles *vis-à-vis* the author of the declaration; it may modify or withdraw its approval at any time, provided that the author of the declaration (or third parties) have not relied on it.

(5) Moreover, despite its limited binding force, an interpretative declaration might constitute the basis for agreement on the interpretation of the treaty; it could also preclude such an agreement from being reached.[2612] In this connection, McRae noted:

[2610] See the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, adopted in 2006 by the International Law Commission, principle 10, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 369. According to principle 10, the two other factors to be taken into account when assessing the arbitrary nature of a revocation are: "(a) Any specific terms of the declaration relating to revocation" and "(c) The extent to which there has been a fundamental change in the circumstances" (*ibid.*, p. 380). *Mutatis mutandis*, these two factors may also be relevant to the implementation of guideline 4.7.2.

[2611] D.W. Bowett, footnote 1609 above, p. 189. See also D.M. McRae, footnote 129 above, p. 168.

[2612] M. Heymann, footnote 147 above, p. 129.

> "The 'mere interpretative declaration' serves notice of the position to be taken by the declaring State and may herald a potential dispute between that State and other contracting parties."[2613]

4.7.3 Effect of an interpretative declaration approved by all the contracting States and contracting organizations

An interpretative declaration that has been approved by all the contracting States and contracting organizations may constitute an agreement regarding the interpretation of the treaty.

Commentary

(1) Assent to an interpretative declaration by all the other parties to the treaty, however, radically alters the situation. Thus, in the International Law Commission, Waldock recalled that the Commission

> "agreed that the relevance of statements of the parties for purposes of interpretation depended on whether they constituted an indication of common agreement by the parties. Acquiescence by the other parties was essential".[2614]

(2) Unanimous agreement by all the parties therefore constitutes a true interpretative agreement which represents the will of the "masters of the treaty" and thus an authentic interpretation.[2615] One example is the unanimous approval by the contracting States to the 1928 Kellogg-Briand Pact of the interpretative declaration of the United States of America concerning the right to self-defence.[2616]

(3) In this case, it is just as difficult to determine whether the interpretative agreement is part of the internal context (article 31, paragraph 2, of the Vienna Conventions) or the external context (article 31, paragraph 3) of the treaty.[2617] The fact is that everything depends on the circumstances in which the declaration was formulated and in which it was approved by the other parties. In a case where a declaration is made before the signing of the treaty and approved when (or before) all the parties have expressed their consent to be bound, the declaration and its unanimous approval, combined, give the appearance of an interpretative agreement that could be construed as being an "agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" within the meaning of article 31, paragraph 2 (a), or as "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" within the meaning of paragraph 2 (b) of the same article. If, however, the interpretative agreement is reached only after the treaty has been concluded, a question might arise as to whether it is merely a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the meaning of article 31, paragraph 3 (b), or if, by virtue of their formal nature, the declaration

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[2613] D.M. McRae, footnote XXX above, pp. 160–161 (footnotes omitted).

[2614] *Yearbook ... 1966*, vol. I (Part One), 829th meeting, 12 January 1966, p. 47, para. 53. See also R. Kolb, *Interpretation et création du droit international* (Brussels, Bruylant, 2006), p. 609.

[2615] See footnote 2578 above. See also M. Heymann, footnote 147 above, pp. 130–135; I. Voïcu, *De l'interprétation authentique des traités internationaux*, (Paris, Pedone, 1968), p. 134; or M. Herdegen, "Interpretation in international law", *Max Planck Encyclopedia of Public International Law*, available online at http://www.mpepil.com/, para. 34.

[2616] *American Journal of International Law (A.J.I.L.) Supplement*, vol. 23, 1929, pp. 1–13.

[2617] See above paragraph (21) of the commentary to guideline 4.7.1.

and unanimous approval combined constitute a veritable "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" (art. 31, para. 3 (a)).[2618]

(4) Without really resolving the question, the Commission wrote in its commentary to article 27 of its 1966 draft articles (which became article 31, paragraph 3 (a) of the 1969 Convention):

> "A question of fact may sometimes arise as to whether an understanding reached during the negotiations concerning the meaning of a provision was or was not intended to constitute an agreed basis for its interpretation. But it is well settled that when an agreement as to the interpretation of a provision is established as having been reached before or at the time of the conclusion of the treaty, it is to be regarded as forming part of the treaty. Thus, in the *Ambatielos* case the Court said: '... the provisions of the Declaration are in the nature of an interpretation clause, and, as such, should be regarded as an integral part of the Treaty ...' Similarly, an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation."[2619]

(5) The fact remains, however, depending on the circumstances — the lack of an automatic effect being indicated by the verb "may" in guideline 4.7.3 — the unanimous approval by the parties of an interpretative declaration made by one of them may constitute an agreement, and an agreement among the parties as to the interpretation of the treaty must be taken into consideration when interpreting the provisions to which it relates.

5. Reservations, acceptances of reservations, objections to reservations, and interpretative declarations in cases of succession of States

Commentary

(1) As the title suggests, Part 5 of the Guide to Practice deals with reservations, acceptances of and objections to reservations and interpretative declarations in cases of succession of States. Part 5 is organized in five sections as follows:

- Reservations in cases of succession of States (5.1)
- Objections to reservations in cases of succession of States (5.2)
- Acceptances of reservations in cases of succession of States (5.3)
- Legal effects of reservations, acceptances and objections in cases of succession of States (5.4)
- Interpretative declarations in cases of succession of States (5.5)

(2) The inclusion of guidelines in this area in the Guide to Practice is all the more important given that:

[2618] In this regard, see, in particular, M. Heymann, footnote 147 above, p. 130.

[2619] *Yearbook ... 1966*, vol. II, p. 221, paragraph (14) of the commentary (footnotes omitted).

- The 1969 and 1986 Vienna Conventions have no provisions on this subject except a safeguard clause, which, by definition, gives no indication as to the applicable rules[2620]

- The 1978 Vienna Convention on Succession of States in respect of Treaties contains only one provision on reservations, namely article 20, which is worded as follows:

Article 20. Reservations

> 1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession under article 17 or 18, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation.
>
> 2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty under article 17 or 18, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of subparagraph (a), (b) or (c) of article 19 of the Vienna Convention on the Law of Treaties.
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> 3. When a newly independent State formulates a reservation in conformity with paragraph 2, the rules set out in articles 20 to 23 of the Vienna Convention on the Law of Treaties apply in respect of that reservation.

(3) Article 20 of the 1978 Vienna Convention scarcely deals with, much less resolves, potential problems arising in connection with reservations in the case of succession of States.[2621] First, it should be noted that the article is contained in Part III of the Convention, which deals with "newly independent States" within the meaning of article 2, paragraph 1 (f), of the Convention, that is, States arising from decolonization,[2622] whereas the question of the rules applicable in the case of the succession of States in respect of part of a territory, the uniting of States or the separation of States is left aside completely. Secondly, while article 20, paragraph 2, provides for the right of the newly independent State to formulate new reservations and while the effect of paragraph 3 is that third States may formulate objections in that event, it fails to stipulate whether the latter can object to a reservation being maintained. Lastly, article 20 of the 1978 Vienna Convention makes no reference whatever to

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[2620] Article 73 of the 1969 Vienna Convention reads: "The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States ... ." A similar safeguard clause appears in article 74, paragraph 1, of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

[2621] See in this regard the observations contained in the first report on reservations *Yearbook of the International Law Commission, 1995*, vol. II, Part One, document A/CN.4/470, pp. 147–148, paras. 132–135. See also pp. 136–137, paras. 62–71, and the second report, *Yearbook ... 1996*, vol. II, Part One, p. 50, para. 46, as well as the memorandum by the Secretariat (A/CN.4/616), p. 3, paras. 1 and 2.

[2622] Under article 2, paragraph 1 (f), of the 1978 Vienna Convention, '"newly independent State' means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible".

succession in respect of objections to reservations — whereas the initial proposals of Waldock did deal with this point[2623] — and the reasons for this omission are not clear.[2624]

(4) This Part of the Guide to Practice seeks to fill these gaps to the extent possible and, in particular, covers cases of succession of States other than that covered by article 20 of the 1978 Convention. It is this diversity of situations that is highlighted by the title of this Part: "Reservations, acceptances of reservations, objections to reservations, and interpretative declarations in cases [plural] of succession of States." Similarly, the various sections make explicit reference to the different possible scenarios for the succession of States by using the plural "cases".

(5) That said, this Part of the Guide to Practice is based on the rules and principles set out in the 1978 Vienna Convention on the Succession of States in respect of Treaties. In particular, it relies on the definition of succession of States given in that instrument.[2625] More generally, the guidelines of this Part of the Guide use the same terminology as the 1978 Vienna Convention, attribute the same meaning to the terms and expressions used in that Convention and defined in its article 2 and are based, where applicable, on the distinctions made in that instrument among the various forms of succession of States, namely:

- "Succession in respect of part of territory" (art. 15)
- "Newly independent States" (art. 2, para. 1 (f) and arts. 16 *et seq.*)
- "Newly independent States formed from two or more territories" (art. 30)
- "Uniting of States" (arts. 31–33); and
- "Separation of parts of a State" (arts. 34–37)

(6) Moreover, Part 5 of the Guide to Practice starts from the premise that the question of a State's succession to a treaty has been settled as a preliminary issue. This is the implication of the word "when", which begins several of the guidelines of this Part and refers to concepts that are considered as settled and need not be revisited by the Commission in dealing with this subject. By this logic, then, the point of departure is that a successor State has the status of a contracting State or even a State party to a treaty as a consequence of the succession of States, not because it has expressed its consent to be bound by the treaty within the meaning of article 11 of the Vienna Convention on the Law of Treaties of 23 May 1969.[2626]

(7) Lastly, like the 1978 Vienna Convention,[2627] the guidelines of Part 5 of the Guide to Practice concern only reservations formulated by a predecessor State that was a contracting State to the treaty in question as of the date of the succession of States.[2628] They do not deal

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[2623] See para. (3) of the commentary to guideline 5.1.1 below.

[2624] P.-H. Imbert, footnote 25 above, pp. 318–322.

[2625] Art. 2, para. 1 (b): "'Succession of States' means the replacement of one State by another in the responsibility for the international relations of territory"; see also art. 2, para. 1 (a), of the 8 April 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, or art. 2 (a) of the articles on the nationality of natural persons in relation to the succession of States annexed to General Assembly resolution 55/153 of 12 December 2000.

[2626] "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."

[2627] See article 20.

[2628] In this connection, it should be noted that the wording of article 20 of the 1978 Vienna Convention is tautological, since contracting State is defined as a State "which has consented to be bound by the treaty, whether or not the treaty has entered into force" [if the treaty has entered into force, it is also a State party] (art. 2, para. 1 (k), of the 1978 Convention, which reproduces with reservations formulated by a predecessor State that had only signed the treaty subject to ratification, acceptance or approval, without having completed the relevant action prior to the date of the succession of States. Reservations of this second kind cannot be considered as being maintained by the successor State because they did not, at the date of the succession of States, produce any legal effects, not having been formally confirmed by the State in question when expressing its consent to be bound by the treaty, as required by article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions.[2629]

5.1 Reservations in cases of succession of States

5.1.1 Newly independent States

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation.

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1.

3. When a newly independent State formulates a reservation in conformity with paragraph 2, the relevant rules set out in Part 2 (Procedure) of the Guide to Practice apply in respect of that reservation.

4. For the purposes of this Part of the Guide to Practice, "newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

Commentary

(1) Guideline 5.1.1 reproduces paragraphs 1 to 3 of article 20 of the 1978 Vienna Convention. This provision relates only to a "newly independent State" within the meaning of article 2, paragraph 1 (f), of the Convention, namely a State that gains independence at the end of a decolonization process.[2630] The Commission decided to place this guideline at the

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art. 2, para. 2 (f), of the 1969 Vienna Convention). The addition of the words "or party" is therefore confusing. Accordingly, the Commission decided to retain this addition only in guideline 5.1.1, which reproduces faithfully the wording of article 20.

[2629] See guideline 2.2.1 above and the commentary thereto.

[2630] See above, para. (3) of the general commentary to Part 5 of the Guide to Practice. See also the memorandum by the Secretariat (A/CN.4/616; see footnote 2621 above), para. 2. This limitation of the scope of article 20 to newly independent States is confirmed by the fact that at the 1977–1978 Vienna Conference, it was suggested that, with respect to other cases of succession, a provision regulating the issue of reservations should be included. The delegation of India, for example, pointed out that there was a gap in the Convention in that respect and, accordingly, a need to add an article on reservations to the part of the Convention which dealt with the uniting and separation of States (A/CONF.80/16, 28th meeting, para. 17). Meanwhile, the delegation of the Federal Republic of Germany proposed a new article 36 *bis* (A/CONF.80/16/Add.1, beginning of Part 5 of the Guide to Practice since it is based on the only provision of the 1978 Vienna Convention which deals with reservations in relation to succession of States.

(2) Paragraph 4 of this guideline, which has no equivalent in article 20 of the 1978 Convention, reproduces the definition of "newly independent State" set out in article 2, paragraph 1 (f), of that Convention. The definition has been reproduced in the Guide to Practice to avoid any misunderstanding regarding the use of this expression, given the importance of the distinction between successor States with the status of newly independent States and other successor States in dealing with legal issues concerning reservations, objections to reservations, acceptances of reservations and interpretative declarations in relation to the succession of States. This limitation of the scope of guideline 5.1.1 is reflected in its title ("Newly independent States").

(3) The origin of the rules set out in article 20 of the 1978 Convention and reproduced in this guideline dates back to a proposal put forward in the third report of Waldock.[2631] The report contained a draft article 9 on "Succession in respect of reservations to multilateral treaties", its purpose being to determine the position of the successor State in regard to reservations, acceptances and objections. After enunciating certain "logical principles" and noting that the — still developing — practice of depositaries was not wholly consistent with them, the Special Rapporteur concluded "that a flexible and pragmatic approach to the problem of succession in respect of reservations is to be preferred".[2632] Concerning reservations, Waldock proposed that rules should be adopted to reflect:

- A presumption in favour of succession to the reservations of the predecessor State unless the successor State has expressed a contrary intention or unless, by reason of its object and purpose, the reservation is appropriate only to the predecessor State (art. 9, para. 1) and
- The possibility for the successor State to formulate new reservations, in which case: (i) the successor State is considered to have withdrawn any different reservations made by the predecessor State; and (ii) the provisions of the treaty itself and of the 1969 Vienna Convention apply to the reservations of the successor State (para. 2).[2633]

43rd meeting, paras. 9–12) that provided in particular for the transposition, to the cases of succession referred to in Part IV of the Convention, of the rules on reservations applicable to newly independent States:

> 1. When under articles 30, 31, 33 and 35 a treaty continues in force for a successor State or a successor State participates otherwise in a treaty not yet in force for the predecessor State, the successor State shall be considered as maintaining:
>
> (a) Any reservation to that treaty made by the predecessor State in regard to the territory to which the succession of States relates;
>
> ...
>
> 2. Notwithstanding paragraph 1, the successor State may however:
>
> (a) Withdraw or modify, wholly or partly, the reservation (paragraph 1, subparagraph (a)) or formulate a new reservation, subject to the conditions laid down in the treaty and the rules set out in articles 19, 20, 21, 22 and 23 of the Vienna Convention on the Law of Treaties ...

(A/CONF.80/30, para. 118, reproduced in *Documents of the Conference*, (A/CONF.80/16/Add.2)).

[2631] *Yearbook ... 1970*, vol. II, document A/CN.4/224 and Add.1, p. 25.

[2632] *Ibid.*, pp. 47 and 50, commentary, paras. (2) and (11).

[2633] *Ibid.*, p. 47.

(4) Paragraph 1 of guideline 5.1.1 reproduces the rebuttable presumption set forth in article 20, paragraph 1, of the 1978 Vienna Convention that a newly independent State shall be considered as maintaining the reservations formulated by the predecessor State. While article 20, paragraph 1, of the Convention makes reference in this context to a newly independent State which establishes its status as a contracting State or a party[2634] to a multilateral treaty through a notification of succession under article 17 or article 18 of the Convention,[2635] reference to these articles was omitted in the text of the guideline. Such a reference seemed unnecessary to the Commission given that the basic principle — the *modus operandi* — of the whole Part 5 of the Guide to Practice consists in assuming that the relevant rules of the 1978 Convention apply.

[2634] On this point, see footnote 2628 above.

[2635] These provisions read as follows:

> Article 17 – Participation in treaties in force at the date of the succession of States
>
> 1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates.
>
> 2. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.
>
> 3. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties, the newly independent State may establish its status as a party to the treaty only with such consent.
>
> Article 18 – Participation in treaties not in force at the date of the succession of States
>
> 1. Subject to paragraphs 3 and 4, a newly independent State may, by a notification of succession, establish its status as a contracting State to a multilateral treaty which is not in force if at the date of the succession of States the predecessor State was a contracting State in respect of the territory to which that succession of States relates.
>
> 2. Subject to paragraphs 3 and 4, a newly independent State may, by a notification of succession, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if at the date of the succession of States the predecessor State was a contracting State in respect of the territory to which that succession of States relates.
>
> 3. Paragraphs 1 and 2 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.
>
> 4. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties or of all the contracting States, the newly independent State may establish its status as a party or as a contracting State to the treaty only with such consent.
>
> 5. When a treaty provides that a specified number of contracting States shall be necessary for its entry into force, a newly independent State which establishes its status as a contracting State to the treaty under paragraph 1 shall be counted as a contracting State for the purpose of that provision unless a different intention appears from the treaty, or is otherwise established.

(5) First proposed by Waldock in his third report,[2636] this presumption was then endorsed by the Commission, despite the proposals put forward subsequently by some States (Australia, Belgium, Canada and Poland) to reverse the presumption; those proposals were neither followed by the second Special Rapporteur, Vallat,[2637] nor subscribed to by the Commission.[2638]

(6) The presumption in favour of the maintenance of the predecessor State's reservations gave rise to little debate at the United Nations Conference on Succession of States in Respect of Treaties, which met in Vienna from 4 April to 6 May 1977 and from 31 July to 23 August 1978. Even though some States again proposed that the presumption should be reversed having regard to the "clean slate" principle,[2639] the Committee of the Whole, and then the Conference itself, approved the article on reservations (which had become article 20) as proposed by the International Law Commission, apart from some very minor drafting changes,[2640] and the presumption in favour of the maintenance of reservations was reflected in the final text of article 20 as adopted at the Vienna Conference.

(7) This presumption had already been proposed by O'Connell, Rapporteur of the International Law Association on the topic "The Succession of New States to the Treaties and Certain Other Obligations of their Predecessors",[2641] one year before Waldock endorsed the

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[2636] See above, para. (3) of the commentary to this guideline.

[2637] *Yearbook ... 1974*, vol. II, Part One, pp. 53–54, paras. 278–286.

[2638] *Ibid.*, vol. I, p. 117, and vol. II, Part One, p. 226.

[2639] For example, at the 1977–1978 Vienna Conference, the representative of the United Republic of Tanzania proposed an amendment reversing the presumption in favour of the maintenance of reservations formulated by the predecessor State and providing that the successor State was considered to have withdrawn reservations formulated by the predecessor State unless it expressed a contrary intention. (See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties.) Vienna, 4 April- 6 May 1977 and 31 July–23 August 1978*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* [1977 session], A/CONF.80/16 (United Nations publication, Sales No. 78.V.8), 28th meeting of the Committee of the Whole, para. 37; and A/CONF.80/14, para. 118 (c) (reproduced in *Documents of the Conference* (A/CONF.80/16/Add.2)). The representative of the United Republic of Tanzania, who expressed a preference for a "clean slate" in regard to reservations and pointed out that reservations formulated by the predecessor State were not necessarily in the interest of the successor State. (A/CONF.80/16, 27th meeting of the Committee of the Whole, para. 79). That amendment was rejected by 26 votes to 14, with 41 abstentions (A/CONF.80/16, 28th meeting of the Committee of the Whole, para. 41). A preference for the opposite presumption had also been expressed by other delegations; see vol. I, 28th meeting of the Committee of the Whole, para. 13 (Romania), para. 18 (India) and para. 33 (Kenya).

[2640] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties, 4 April -6 May 1977 and 31 July-[illegible]3 August 1978*, vol. I. *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* [resumed session 1978], A/CONF.80/16/Add.1 (United Nations publication, Sales No. E.78.V.8), 28th meeting of the Committee of the Whole, para. 41 (hereinafter A/CONF.80/16/Add.1).

[2641] "Additional point" No. 10 proposed by the Rapporteur of the Committee on "the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors", International Law Association, Buenos Aires Conference (1968), *Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors*, cited in Waldock's second report on succession in respect of treaties, *Yearbook ... 1969*, vol. II (United Nations publication, Sales No. E.70.V.8), document A/CN.4/214 and Add.1 and 2, p. 49, para. 17: "A successor State can continue only the legal situation brought about as a result of its predecessor's signature or ratification. Since a reservation delimits that legal situation it follows that the treaty is succeeded to (if at all) with the reservation."

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concept.[2642] It reflects the concern to respect the actual intention of the successor State by avoiding the creation of an irreversible situation: "if a presumption in favour of maintaining reservations were not to be made, the actual intention of the successor State might be irrevocably defeated; whereas, if it were made and the presumption did not correspond to the successor State's intention, the latter could always redress the matter by withdrawing the reservations".[2643]

(8) This solution is not self-evident and has been criticized in the literature. For example, according to Imbert, "*il n'y aucune raison pour penser que l'État n'étudiera pas le texte de la Convention avec suffisamment de soin, pour savoir exactement les réserves qu'il veut maintenir, abandonner ou formuler*" ["… there is no reason to think that the State would not study the text of the Convention carefully enough to know exactly which reservations it wished to maintain, abandon or formulate"].[2644] This author cast doubt in particular on the assumption that the predecessor State's reservations would be "*nécessairement avantageuses pour l'État nouvellement independent … [L]es réserves constituant des dérogations, des limitations aux engagements de l'État, elles ne devraient pas pouvoir être présumées. Il serait au contraire normal de partir du principe que, en l'absence d'une déclaration de volonté formelle de sa part, un État est lié par l'ensemble du traité*" ["necessarily advantageous to the newly independent State ... Since reservations constitute derogations from or limitations on a State's commitments, they should not be a matter of presumption. On the contrary, it makes more sense to assume that, in the absence of a formal statement of its intention, a State is bound by the treaty as a whole"].[2645]

(9) The commentary to draft article 19 as finally adopted by the Commission nonetheless puts forward some convincing arguments supporting the presumption in favour of the maintenance of reservations formulated by the predecessor State:

> "First, the presumption of an intention to maintain the reservations was indicated by the very concept of succession to the predecessor's treaties. Secondly, a State is in general not to be understood as having undertaken more onerous obligations unless it has unmistakably indicated an intention to do so; and to treat a newly independent State, on the basis of its mere silence, as having dropped its predecessor's reservations would be to impose upon it a more onerous obligation. Thirdly, if presumption in favour of maintaining reservations were not to be made, the actual intention of the newly independent State might be irrevocably defeated; whereas, if it were made and the presumption did not correspond to the newly independent State's intention, the latter could always redress the matter by withdrawing the reservations.[2646]

(10) This seems to be the majority position in the literature, tending to support the presumption in favour of the maintenance of the predecessor State's reservations. Thus, O'Connell explains:

[2642] See above, para. (3) of the commentary to this guideline.

[2643] Third report (see footnote 2631 above), *Yearbook … 1970*, vol. II, p. 50; see also the elements of practice invoked in support of this solution, *ibid.*, pp. 47–49.

[2644] P.-H. Imbert, footnote 25 above, p. 309.

[2645] *Ibid.*, p. 310. Imbert thus echoes the criticisms of some States (see footnote 2639 above) put forward at the 1977–1978 Vienna Conference, in particular by the representative of the United Republic of Tanzania, who expressed a preference for a "clean slate" in regard to reservations and pointed out that reservations formulated by the predecessor State were not necessarily in the interest of the successor State.

[2646] *Yearbook … 1974*, vol. II, Part One, p. 226, para. (17) of the commentary to article 19.

> Since a State which makes a reservation to a multilateral convention commits itself only to the convention as so reserved, its successor State cannot, logically, succeed to the convention without reservations. Should the reservation be unacceptable to it the appropriate procedure would be to ask the depositary to remove it and notify all parties accordingly.[2647]

Similarly, Gaja takes the view that:

> The opinion that the predecessor State's reservations are maintained is also based on the reasonable assumption that when a newly independent State elects to become a party to a treaty by means of a notification of succession, in principle it wants the treaty to continue to be applied to its territory in the same way as it did before independence.[2648]

(11) One can see in this presumption a logical implication from the fact that succession to a treaty by a newly independent State, though voluntary, is a true succession that must be distinguished from accession. Because it is a succession, it seems reasonable to presume that treaty obligations are transmitted to the successor State as modified by the reservation formulated by the predecessor State.

(12) Nevertheless, as the last clause of paragraph 1 of this guideline shows, the presumption in favour of the newly independent State's maintenance of reservations formulated by the predecessor State is rebuttable. The presumption is reversed not only if a "contrary intention" is specifically expressed by the successor State when making the notification of succession, but also if that State formulates a reservation "which relates to the same subject matter" as the reservation formulated by the predecessor State. The exact wording of this second possibility was a subject of debate in the Commission when this provision was being drafted.

(13) Waldock had proposed, in his third report, a different formulation that provided for the reversal of the presumption that the predecessor State's reservations were maintained if the successor State formulated "reservations different from those applicable at the date of succession".[2649] In its draft article 15 adopted on first reading in 1972, the Commission settled on a solution according to which the presumption that the predecessor State's reservations were maintained was reversed if the successor State formulated a new reservation "which relates to the same subject matter and is incompatible with [the reservation formulated by the predecessor State]".[2650] However, in his first report in 1974, Vallat, who had been appointed Special Rapporteur, endorsed a proposal made by Zambia and the United Kingdom and returned if not to the letter at least to the spirit of Waldock's proposal, though he described the change in question as minor, by removing the "incompatibility" test and providing only that a reservation of the predecessor State is not maintained if the successor State formulates a reservation relating to the same subject matter.[2651] Subject to a further drafting change, the Commission agreed with him on that point.[2652]

[2647] Daniel Patrick O'Connell, *State Succession in Municipal Law and International Law*, Cambridge Studies in International and Comparative Law, No. 7, vol. II: International Relations (Cambridge, Cambridge University Press, 1967), p. 229 (footnote omitted).

[2648] Giorgio Gaja, "Reservations to Treaties and the Newly Independent States", *Italian Yearbook of International Law*, 1975, p. 55. See also J.M. Ruda, footnote 56 above, p. 206; also Padmanabhan K. Menon, "The Newly Independent States and Succession in respect of Treaties", *Korean Journal of Comparative Law*, vol. 18 (1990), p. 152.

[2649] Third report (see footnote 2631 above), *Yearbook ... 1970*, vol. II, p. 46.

[2650] *Yearbook ... 1972*, vol. II, p. 260.

[2651] *Yearbook ... 1974*, vol. II, Part One, A/CN.4/278 and Add.1-6, in particular p. 54, para. 287.

[2652] *Ibid.*, p. 222 (art. 19).

(14) It should be noted that the wording that was finally adopted by the Commission and reflected in the 1978 Vienna Convention has been criticized in the literature for omitting the test of "incompatibility" between a reservation formulated by the predecessor State and one formulated by the successor State.[2653] Nonetheless, in accordance with Vallat's proposal,[2654] the Commission finally deleted this requirement from the final draft article for pragmatic reasons, which it explained in the commentary to the corresponding article adopted on second reading in 1974:

> The test of incompatibility for which the paragraph provided might be difficult to apply and ... if the newly independent State were to formulate a reservation relating to the same subject matter as that of the reservation made by the predecessor State, it could reasonably be presumed to intend to withdraw that reservation.[2655]

(15) Paragraph 2 of guideline 5.1.1 reproduces article 20, paragraph 2, of the 1978 Vienna Convention. It recognizes that a newly independent State has the right to formulate a reservation when making its notification of succession to the treaty. This right is subject to the general conditions laid down in article 19, subparagraphs (a), (b) and (c), of the 1969 Vienna Convention on the Law of Treaties and reiterated in guideline 3.1, to which paragraph 2 of this guideline refers. Under article 20, paragraph 3, of the 1978 Vienna Convention, the rules set out in articles 20 to 23 of the 1969 Vienna Convention on the Law of Treaties apply in respect of reservations formulated by a newly independent State when making a notification of succession. Given that the relevant rules regarding the formulation of a reservation are duly specified in Part 2 of the Guide to Practice, paragraph 3 of this guideline refers to that part of the Guide.[2656]

(16) In its commentary to draft article 19, the Commission noted that the right of a newly independent State to formulate reservations to a treaty to which it has made a notification of succession seemed to be confirmed in practice.[2657] In support of this solution, Waldock, in his third report, based his views in particular on the practice of the Secretary-General of the United Nations, who, on several occasions, had recognized that newly independent States enjoyed that right without prompting any objections from States to that assumption.[2658] The second Special Rapporteur was also in favour, for "practical" reasons, of recognizing the right of a newly independent State to make new reservations when making a notification of succession.[2659]

[2653] See G. Gaja, footnote 2648 above, pp. 59 and 60.

[2654] First report, *Yearbook* ... *1974*, vol. II, Part One, p. 54.

[2655] *Yearbook* ... *1974*, vol. II, Part One, p. 226, para. (18) of the commentary to article 19.

[2656] The correspondences between the Vienna Convention and the Guide to Practice are as follows:

1969 Convention, art. 20: para. 1 = guidelines 2.8.1 and 2.8.2 (with drafting changes); para. 2 = guideline 2.8.7 (*idem*); para. 3 = guideline 2.8.8 (*idem*); para. 4 (a): guideline 4.2.1; para. 4 (b) = guideline 2.6.7 (with drafting changes); para. 5 = guideline 2.8.2 (with drafting changes).

Art. 21: guideline 4.2.4.

Art. 22: para. 1 = guideline 2.5.1 (*idem*); para. 2 = guideline 2.7.1 (*idem*); para. 3 (a) = guidelines 2.5.8 and 2.5.9 (with drafting changes); para. 3 (b) = guideline 2.7.5 (*idem*).

Art. 23: para. 1 = guidelines 2.1.1, 2.6.5 and 2.8.4 (with drafting changes); para. 2 = guideline 2.2.1 (*idem*); para. 3 = guideline 2.8.6 (with drafting changes); para. 4 = guidelines 2.5.2 and 2.7.2 (with drafting changes).

[2657] *Yearbook* ... *1974*, vol. II, Part One, pp. 224–225, paras. (7) to (12).

[2658] Third report (see footnote 2631 above), pp. 48–50.

[2659] Sir Francis Vallat, first report, *Yearbook* ... *1974*, vol. II, Part One, p. 54, paras. 291–294.

(17) The view of the two Special Rapporteurs prevailed in the Commission, which, as indicated in the commentary to draft article 19 as finally adopted, had a choice between two alternatives:

> (a) to decline to regard any notification of succession made subject to new reservations as a true instrument of succession and to treat it in law as a case of accession, or (b) to accept it as having the character of a succession but at the same time apply to it the law governing reservations as if it were a wholly new expression of consent to be bound by the treaty.

Drawing upon the practice of the Secretary-General and wishing to take a "flexible" approach in that regard, the Commission opted for the second alternative, noting also that it might ease the access of a newly independent State to a treaty that was not, "for technical reasons, open to its participation by any other procedure than succession".[2660]

(18) At the 1977–1978 Vienna Conference, the Austrian delegation challenged that solution — which, in purely logical terms, was somewhat incompatible with the preceding paragraph — and proposed the deletion of paragraphs 2 and 3 of the provision that would become article 20 of the 1978 Convention.[2661] Austria contended that recognizing the right of a newly independent State to formulate new reservations when notifying its succession "seemed to be based on an erroneous concept of succession"[2662] and that "if a newly independent State wished to make reservations, it should use the ratification or accession procedure provided for becoming a party to a multilateral treaty".[2663] However, the Austrian amendment was rejected by 39 votes to 4, with 36 abstentions.[2664] The States opposing the Austrian amendment at the Vienna Conference put forth various arguments, including the desirability of ensuring that the newly independent State would "not be obliged to conform with more complicated ratification procedures than those provided for by the International Law Commission",[2665] the alleged incompatibility of the Austrian amendment with the principle of self-determination[2666] or the principle of the "clean slate",[2667] the need to be "realistic" rather than "puristic",[2668] and the fact that a succession of States was not a "legal inheritance or a transmission of rights and obligations".[2669] Some authors have echoed these criticisms,[2670] while others take the view that "the right to make reservations is not a right that is transmissible through inheritance, but

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[2660] Commentary to draft article 19, *Yearbook ... 1974*, vol. II, Part One, p. 227, para. (20).

[2661] A/CONF.80/16, 27th meeting of the Committee of the Whole, paras. 59–64.

[2662] *Ibid.*, para. 60.

[2663] *Ibid.* See also A/CONF.80/16, 28th meeting of the Committee of the Whole, para. 30.

[2664] *Ibid.*, 28th meeting of the Committee of the Whole, para. 40.

[2665] A/CONF.80/16, 27th meeting of the Committee of the Whole, para. 71 (Netherlands).

[2666] *Ibid.*, para. 73 *in fine* (Algeria) and para. 89 (Guyana).

[2667] *Ibid.*, para. 85 (Madagascar).

[2668] *Ibid.*, para. 77 (Poland).

[2669] A/CONF.80/16, 28th meeting of the Committee of the Whole, para. 7 (Israel). According to the representative of Israel, "A newly independent State ... would simply have the right of option to establish itself as a separate party to the treaty in virtue of the legal nexus established by its predecessor. Its right was to notify its own consent to be considered as a separate party to the treaty; that was not a right to step into the predecessor's shoes. The significance of article 19 was that a newly independent State should be 'considered' as maintaining its succession to the treaty. In other words, notification of succession was an independent act of the successor State's own volition."

[2670] See Karl Zemanek, "State Succession after Decolonization", *Recueil des cours* ...vol. 116 (1965-III), pp. 234 and 235; André Gonçalves Pereira, *La succession d'États en matière de traités* (Paris, Pedone, 1969), pp. 175 and 176, note 50; and Hanna Bokor-Szegő, *New States and International Law* (Budapest, Akadémiai Kiadó, 1970), p. 100.

a prerogative that is part of the set of supreme powers attributed by virtue of the protective principle to sovereign States" and that "the formal recognition of this capacity [on the part of a newly independent State] represents a 'pragmatic' solution that takes account of the 'non-automatic', *i.e.* voluntary, nature of succession to treaties on the part of newly independent States".[2671]

(19) In fact, the principles laid down in article 20 of the 1978 Convention are not overly rigid and are flexible enough to accommodate a wide variety of practices, as shown by a number of cases of succession to treaties deposited with the Secretary-General of the United Nations:

> (i) In many cases, newly independent States have deposited a notification of succession to a particular treaty without making any mention of the question of reservations; in such cases, the Secretary-General has included the newly independent State in the list of States parties to the treaty concerned without passing judgement upon the status of reservations formulated by the predecessor State;[2672]
>
> (ii) Some newly independent States have expressly maintained the reservations formulated by the predecessor State;[2673]
>
> (iii) In other cases, the newly independent State has essentially reformulated the same reservations made by the predecessor State;[2674]
>
> (iv) There have been cases in which the newly independent State has maintained the reservations formulated by the predecessor State while adding new reservations;[2675]
>
> (v) There have also been cases in which the newly independent State has "reworked" reservations made by the predecessor State;[2676]
>
> (vi) In a few cases, the newly independent State has withdrawn the predecessor State's reservations while formulating new reservations.[2677]

All these possibilities are acceptable under the terms of article 20, whose flexibility is unquestionably one of its greatest virtues.

(20) According to article 20, paragraph 2, of the 1978 Vienna Convention, "a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of subparagraphs (a), (b) and (c) of article 19 of the [1969] Vienna Convention on the Law of Treaties". Paragraph 2 of guideline 5.1.1 provides a reminder that any reservation formulated by a newly independent State when making a notification of succession is subject to the condition of permissibility set out in

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[2671] Marco G. Marcoff, *Accession à l'indépendance et succession d'États aux traités internationaux* (Fribourg, Éditions universitaires, 1969), p. 346.

[2672] See, for example, *Multilateral Treaties ...*, chap. IV.2: The Solomon Islands succeeded to the International Convention on the Elimination of All Forms of Racial Discrimination without making any mention of the reservations made by the predecessor State (the United Kingdom), which are not reproduced in relation to the Solomon Islands. The same is true in the case of Senegal's and Tunisia's succession to the 1951 Convention relating to the Status of Refugees (*ibid.*, chap. V.2).

[2673] Cyprus, Gambia and Tuvalu (*ibid.*, chap. V.2, 1951 Convention relating to the Status of Refugees).

[2674] Fiji and Jamaica (*ibid.*).

[2675] Botswana and Lesotho (*ibid.*, chap. V.3, Convention relating to the Status of Stateless Persons).

[2676] Fiji (*ibid.*, chap. V.3, Convention relating to the Status of Stateless Persons).

[2677] Zambia (*ibid.*, chap. V.3, Convention relating to the Status of Stateless Persons); Zimbabwe (*ibid.*, chap. V.2, Convention relating to the Status of Refugees).

subparagraphs (a), (b) and (c) of guideline 3.1, which reproduces article 19 of the 1969 and 1986 Vienna Conventions.

(21) Paragraph 3 of guideline 5.1.1 recalls that the rules set out in Part 2 (Procedure) of the Guide to Practice apply to reservations formulated by a newly independent State when making a notification of succession. This accords with paragraph 3 of article 20 of the 1978 Vienna Convention, which states that "When a newly independent State formulates a reservation in conformity with paragraph 2, the rules set out in articles 20 to 23 of the Vienna Convention on the Law of Treaties apply in respect of that reservation." The reference includes article 20, paragraph 4, (c) of the 1969 Vienna Convention, which provides that "an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation". It follows that a notification of succession containing a reservation will take effect only from that date.

(22) Although article 20 of the 1978 Vienna Convention applies only to reservations formulated in respect of treaties between States, guideline 5.1.1, like the other guidelines in the Guide to Practice, also covers reservations to treaties between States and international organizations.

5.1.2 Uniting or separation of States

1. Subject to the provisions of guideline 5.1.3, a successor State which is a party to a treaty as the result of a uniting or separation of States shall be considered as maintaining any reservation to the treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates, unless it expresses its intention not to maintain one or more reservations of the predecessor State at the time of the succession.

2. A successor State which is a party to a treaty as the result of a uniting or separation of States may neither formulate a new reservation nor widen the scope of a reservation that is maintained.

3. When a successor State formed from a uniting or separation of States makes a notification whereby it establishes its status as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State, that State shall be considered as maintaining any reservation to the treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates, unless it expresses a contrary intention when making the notification or formulates a reservation which relates to the same subject matter as that reservation. That successor State may formulate a new reservation to the treaty.

4. A successor State may formulate a reservation in accordance with paragraph 3 only if the reservation is one the formulation of which would not be excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1. The relevant rules set out in Part 2 (Procedure) of the Guide to Practice apply in respect of that reservation.

Commentary

(1) As the title suggests, this guideline deals with the uniting or separation of States. These cases are not covered by article 20 of the 1978 Vienna Convention or by guideline 5.1.1, which apply only to newly independent States, that is to say those arising from a

decolonization process.[2678] This guideline is intended to fill a gap in the Vienna Convention. Given the general scope of this guideline, which covers both cases involving the separation of parts of a State and cases involving the uniting of two or more States, the term "predecessor State" should be understood, in cases involving the uniting of States, to mean one or more of the predecessor States.

(2) Guideline 5.1.2 deals with two situations separately. Paragraphs 1 and 2 deal with the case in which a State formed from a uniting or separation of States succeeds *ipso jure* to a treaty, whereas paragraph 3 deals with the case in which such a successor State succeeds to a treaty only through a notification whereby it expresses its intention to succeed thereto. While the presumption in favour of the maintenance of the predecessor State's reservations is applicable in both situations envisaged,[2679] the distinction between the two situations proves decisive with respect to the right to formulate new reservations, which is recognized to a State formed from a uniting or separation of States only in the event that succession to a treaty is voluntary in nature.[2680]

(3) The reference in paragraphs 1 and 2 of this guideline to "a successor State which is a party to a treaty *as the result of* a uniting or separation of States" was used to indicate that the guideline covers the situation in which a succession to the treaty occurs *ipso jure*, and not on the basis of a notification to that effect by the successor State. Under Part IV of the 1978 Vienna Convention, such is the situation of a State formed from a uniting or separation of States with regard to treaties in force for any of the predecessor States at the date of the succession of States; in principle,[2681] these treaties remain in force for a State formed from a uniting of two or more States.[2682] The same applies to the case of a State formed from a separation of States, with respect to treaties in force at the date of the succession of States in respect of the entire territory of the predecessor State, and also treaties in force in respect only of that part of the territory of the predecessor State which has become the territory of the successor State.[2683] However, the practice of States and depositaries does not seem unanimous in terms of recognition of the automatic nature of succession to treaties in the context of a separation or uniting of States.

(4) In any event, under the 1978 Vienna Convention, succession does not occur *ipso jure* in respect of a State formed from a uniting or separation of States with regard to treaties to which the predecessor State was a contracting State at the date of succession of States but which at that date were not in force for the State concerned. In such cases, succession to the treaty is of a voluntary nature and implies a notification whereby the successor State establishes, as the case may be, its status as a contracting State.[2684] These situations are referred to in paragraph 3 of this guideline.

(5) Paragraphs 1 and 3 of this guideline extend to the two different situations envisaged therein the presumption in favour of the maintenance of the predecessor State's reservations, which is provided for explicitly in article 20, paragraph 1, of the 1978 Vienna Convention for newly independent States in the context of a notification of succession and which is

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[2678] See above, para. (2) of the general commentary to Part 5 of the Guide to Practice and paras. (1) and (2) of the commentary to guideline 5.1.1.

[2679] See below, paras. (5) and (10) of the commentary.

[2680] See below, paras. (11) and (15) of the commentary.

[2681] Articles 31 and 34 of the Convention recognize exceptions concerning the express or tacit agreement of the parties.

[2682] See article 31 of the Convention.

[2683] See article 34 of the Convention.

[2684] See articles 32 and 36 of the Convention.

reproduced in guideline 5.1.1. There can be no doubt as to the application of this presumption to successor States other than newly independent States; it may even be said that the presumption is even stronger when succession occurs *ipso jure*. This corresponds, moreover, to the view expressed during the 1977–1978 Vienna Conference by some delegations which considered that the presumption was self-evident in cases of the uniting or separation of States, in the light of the principle of continuity reflected in the Convention in relation to these kinds of succession.[2685]

(6) While this provision establishes a general presumption in favour of the maintenance of reservations, there are nonetheless exceptions to this presumption in certain cases involving the uniting of two or more States; these are covered by guideline 5.1.3, which is referred to in paragraph 1 of the present guideline.

(7) The applicability of the presumption in favour of the maintenance of the predecessor State's reservations to States formed from the uniting or separation of States seems to be reflected to some extent in practice.

(8) While the Secretary-General of the United Nations, in the exercise of his functions as depositary, generally avoids taking a position on the status of reservations formulated by the predecessor State, the practice in cases involving separation of States, in particular those of the States that emerged from the former Yugoslavia and from Czechoslovakia,[2686] shows that the predecessor State's reservations have been maintained. It should be noted in this regard that the Czech Republic,[2687] Slovakia,[2688] the Federal Republic of Yugoslavia[2689] and,

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[2685] See, in this regard, the statements by the delegations of Poland (A/CONF.80/16/Add.1, 43rd meeting of the Committee of the Whole, para. 13), France (*ibid.*, para. 16), Cyprus (*ibid.*, para. 20), Yugoslavia (*ibid.*, para. 21) and Australia (*ibid*, para. 22). See also the draft article 36 *bis* proposed by Germany (see footnote 2631 above), which sought, among other things, to extend the presumption in question to cases of uniting and separation of States.

[2686] There appears to be virtually no relevant practice in relation to the successor States of the former Soviet Union.

[2687] In a letter dated 16 February 1993 addressed to the Secretary-General and accompanied by a list of multilateral treaties deposited with the Secretary-General, the Government of the Czech Republic communicated the following: "In conformity with the valid principles of international law and to the extent defined by it, the Czech Republic, as a successor State to the Czech and Slovak Federal Republic, considers itself bound, as of 1 January 1993, *i.e.*, the date of the dissolution of the Czech and Slovak Federal Republic, by multinational international treaties to which the Czech and Slovak Federal Republic was a party on that date, including reservations and declarations to their provisions made earlier by the Czech and Slovak Federal Republic.

The Government of the Czech Republic has examined multilateral treaties the list of which is attached to this letter. [The Government of the Czech Republic] considers to be bound by these treaties as well as by all reservations and declarations to them by virtue of succession as of 1 January 1993. The Czech Republic, in accordance with the well-established principles of international law, recognizes signatures made by the Czech and Slovak Federal Republic in respect of all signed treaties as if they were made by itself", in *Multilateral Treaties ...*, *Status of Treaties*, *Historical Information*, under "Czech Republic".

[2688] In a letter dated 19 May 1993 and also accompanied by a list of multilateral treaties deposited with the Secretary-General, the Government of the Slovak Republic communicated the following: "In accordance with the relevant principles and rules of international law and to the extent defined by it, the Slovak Republic, as a successor State, born from the dissolution of the Czech and Slovak Federal Republic, considers itself bound, as of 1 January 1993, *i.e.*, the date on which the Slovak Republic assumed responsibility for its international relations, by multilateral treaties to which the Czech and Slovak Federal Republic was a party as of 31 December 1992, including reservations and declarations made earlier by Czechoslovakia, as well as objections by Czechoslovakia to reservations formulated by other treaty-parties" (*ibid.*, *Historical Information*, under "Slovakia").

subsequently, Montenegro[2690] formulated general declarations whereby these successor States reiterated the reservations of the predecessor State.[2691] In addition, in some cases the predecessor State's reservations have been expressly confirmed[2692] or reformulated[2693] by the successor State in relation to a particular treaty. In the case of the Republic of Yemen (united), there was also maintenance of reservations by the successor State. In a letter dated 19 May 1990 addressed to the Secretary-General, the Ministers for Foreign Affairs of the Yemen Arab Republic and the People's Democratic Republic of Yemen communicated the following:

> "As concerns the treaties concluded prior to their union by the Yemen Arab Republic or the People's Democratic Republic of Yemen, the Republic of Yemen (as now united) is accordingly to be considered as a party to those treaties as from the date when one of these States first became a party to those treaties. Accordingly the tables showing the status of treaties will now indicate under the designation 'Yemen' the date of the formalities (signatures, ratifications, accessions, declarations and reservations, etc.) effected by the State which first became a party, those eventually effected by the other being described in a footnote."[2694]

(9) In addition, some elements of the practice in relation to treaties deposited with other depositaries seem to confirm the general presumption in favour of the maintenance of the predecessor State's reservations, although, admittedly, the practice is rather sparse. The Czech Republic and Slovakia transmitted to a number of depositaries notifications of succession similar to those transmitted to the Secretary-General of the United Nations and providing for the maintenance of reservations formulated by the predecessor State.[2695] Neither the depositaries in question nor the other parties to the treaties concerned raised any objections to

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[2689] By a notification dated 8 March 2001, the Government of the Federal Republic of Yugoslavia deposited an instrument, *inter alia*, communicating its intent to succeed to various multilateral treaties deposited with the Secretary-General and confirming certain actions relating to such treaties: "[T]he Government of the Federal Republic of Yugoslavia maintains the signatures, reservations, declarations and objections made by the Socialist Federal Republic of Yugoslavia to the treaties listed in the attached annex 1, prior to the date on which the Federal Republic of Yugoslavia assumed responsibility for its international relations" (*ibid.*, *Historical Information*, under "Yugoslavia").

[2690] On 23 October 2006 the Secretary-General received a letter dated 10 October 2006 from the Government of Montenegro, accompanied by a list of multilateral treaties deposited with the Secretary-General, informing him that: "[The Government of] … the Republic of Montenegro does maintain the reservations, declarations and objections made by Serbia and Montenegro, as indicated in the Annex to this instrument, prior to the date on which the Republic of Montenegro assumed responsibility for its international relations" (*ibid.*, *Historical Information*, under "Montenegro").

[2691] See also the case of other successors to the former Yugoslavia (apart from Serbia), which appear in the list of successor States for a number of treaties deposited with the Secretary-General with the indication, in footnotes, of reservations formulated by the former Yugoslavia (see, for example, Bosnia and Herzegovina, Croatia, Serbia and the former Yugoslav Republic of Macedonia in relation to the Convention on the Privileges and Immunities of the United Nations (*ibid.*, chap. III.1, note 2); the Protocol relating to the Status of Refugees (chap. V.5, note 5) and the Convention relating to the Status of Stateless Persons (chap. V.3, note 2).

[2692] Convention on the Prevention and Punishment of the Crime of Genocide, reservation formulated by the Federal Republic of Yugoslavia (*ibid.*, chap. IV.1).

[2693] Convention on the Rights of the Child (*ibid.*, chap. IV.11, under "Slovenia").

[2694] *Ibid.*, *Historical Information*, under "Yemen".

[2695] See Václav Mikulka, "The Dissolution of Czechoslovakia and Succession in Respect of Treaties", in Mojmir Mrak (ed.), *Succession of States* (The Hague/Boston/London, M. Nijhoff, 1999), pp. 111 and 112.

this practice. The Universal Postal Union's reply to the questionnaire[2696] is also worth noting. That organization's practice is to consider that valid reservations applicable to a member State are automatically transferred to the successor State; the same is true in the case of States that have become independent by separating from a member State. The Council of Europe applied the same presumption with respect to Montenegro. In a letter dated 28 June 2006 addressed to the Minister for Foreign Affairs of Montenegro, the Director-General of Legal Affairs of the Council of Europe indicated that, in accordance with article 20 of the Vienna Convention of 1978, the Republic of Montenegro was considered "as maintaining these reservations and declarations because the Republic of Montenegro's declaration of succession does not express a contrary intention in that respect".[2697] That letter also included a list of reservations and declarations that had been revised in places to remove references to the Republic of Serbia. By a letter dated 13 October 2006, the Minister for Foreign Affairs of Montenegro communicated his agreement on the wording of those reservations and declarations. The practice followed by Switzerland as depositary of a number of multilateral treaties likewise does not appear to be in fundamental contradiction to that of the Secretary-General of the United Nations. It is true that Switzerland had initially applied, to a successor State that made no reference to the status of the predecessor State's reservations, the presumption that such reservations were not maintained. Today, however, Switzerland no longer applies any presumption, as its practice is to invite the successor State to communicate its intentions as to whether or not it is maintaining reservations formulated by the predecessor State.[2698]

(10) As with newly independent States, the presumption in favour of the maintenance of the predecessor State's reservations is also rebuttable in respect of successor States formed from a uniting or separation of States. In this respect, as can be seen from paragraph 1 and paragraph 3 of this guideline, there is no doubt that such a successor State may reverse the presumption by expressing its intention not to maintain one or more reservations of the predecessor State. Under paragraph 1 of guideline 5.1.1, the reversal of the presumption also occurs when a newly independent State formulates a reservation which relates to the "same subject matter" as the reservation formulated by the predecessor State.[2699] In guideline 5.1.2, this possibility is referred to in paragraph 3, which applies to situations in which succession to the treaty by a State formed from a uniting or separation of States is of a voluntary nature. In contrast, the possibility of reversing the presumption by the formulation of a reservation relating to the same subject is not mentioned in paragraph 1, as the right to formulate reservations is not recognized to a successor State when the succession does not depend on an expression of will on its part.

(11) If, in cases involving the uniting or separation of States, succession is considered to take place *ipso jure* in respect of treaties that were in force for the predecessor State at the

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[2696] Regarding the questionnaire, see footnote 39 above.

[2697] JJ55/2006, PJD/EC (translated by the Secretariat in its memorandum (A/CN.4/616), see footnote 2621 above, p. 23, para. 67).

[2698] See the letter dated 3 May 1996 from the Directorate of Public International Law addressed to an individual, describing changes in the practice of Switzerland as depositary State for the Conventions of 12 August 1949 for the protection of victims of war, in relation to the succession of States to treaties; reproduced in *Revue suisse de droit international et de droit européen*, 1997, pp. 683–685, in particular p. 684. This approach was confirmed in an opinion given on 6 February 2007 by the Directorate of Public International Law of the Federal Department of Foreign Affairs, entitled "Pratique de la Suisse en tant qu'État dépositaire. Réserves aux traités dans le contexte de la succession d'États", reproduced in *Jurisprudence des autorités administratives de la Confédération (JAAC)*, 5 December 2007, pp. 328–330, in particular p. 330 (available from www.bk.admin.ch/ dokumentation/02574/02600/index.html?lang=fr).

[2699] See guideline 5.1.1, para. 1, above.

time of the succession of States, it is difficult to contend that a successor State may evade or lighten its obligations by formulating reservations. Paragraph 2 of the guideline thus rules out the right of such a successor State to formulate new reservations to the treaty. By the same reasoning, as the last phrase of paragraph 2 indicates, a State which succeeds *ipso jure* to a treaty may not be recognized as having the right to extend the scope of a reservation it maintains.[2700]

(12) Also worth mentioning in this regard, in addition to the arguments made against this possibility during the drafting of the 1978 Convention,[2701] is the position taken by the Council of Europe in its letter of 28 June 2006 to Montenegro,[2702] to the effect that that State did "not have the possibility, at this stage, to make new reservations to the treaties already ratified" and to which it had notified its succession.[2703] This position seems to be consistent with the rule of *ipso jure* succession to treaties, as set out in the 1978 Convention for cases involving the uniting or separation of States. This solution also seems to have been confirmed in practice, as successor States other than newly independent States have not formulated new reservations upon succeeding to treaties.

(13) The solution set out in paragraph 2 of guideline 5.1.2 also seems to be echoed in the separate opinion by Judge Tomka to the judgment of the International Court of Justice of 26 February 2007 in the *Genocide* case:

> 35. There can be no doubt that this decision to notify of the accession to the Genocide Convention, with a reservation to Article IX and *not succession (where no reservation is allowed)* was motivated by the considerations relating to the present case. (…)
>
> "*That single notification of accession, in my view, was totally inconsistent with the succession by the Federal Republic of Yugoslavia* — notified the very same day to the United Nations Secretary-General as accession to the Genocide Convention — *to the Vienna Convention on Succession of States in Respect of Treaties*, which in article 34 provides that the treaties of the predecessor State continue in force in respect of each successor State. By the latter notification of succession, the Federal Republic of Yugoslavia became a contracting State of the Vienna Convention on Succession of States in Respect of Treaties as of April 1992. That Convention entered into force on 6 November 1996. Although not formally applicable to the process of the dissolution of the former Yugoslavia, which occurred in the 1991–1992 period, in light of the fact that the former Yugoslavia consented to be bound by the Vienna Convention already in 1980, and the Federal Republic of Yugoslavia has been a contracting State to that

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[2700] See guideline 2.3.4 above.

[2701] It is worth recalling in this regard the objections formulated by certain delegations to the proposal by the Federal Republic of Germany (later withdrawn) to include a draft article 36 *bis* in the Convention which would have granted to successor States other than newly independent States, among other things, the right to formulate new reservations, even in respect of a treaty that remains in force for the successor State (A/CONF.80/16/Add.1, 43rd meeting, paras. 9–12) (see footnote 2630 above). The delegations in question considered that giving a successor State the right to formulate new reservations was inconsistent with the principle of *ipso jure* continuity of treaties set out by the Convention for cases involving the uniting or separation of States (see A/CONF.80/16/Add.1, 43rd meeting, para. 14 (Poland), para. 15 (United States of America), para. 18 (Nigeria), para. 19 (Mali), para. 20 (Cyprus), para. 21 (Yugoslavia), para. 22 (Australia) and para. 24 (Swaziland, albeit in more nuanced terms)) – see footnote 2630 above.

[2702] See above, footnote 2697.

[2703] Translated by the Secretariat in its memorandum (A/CN.4/616), see footnote 2621 above, p. 23, para. 69.

> Convention since April 1992, *one would not expect, by analogy to article 18 of the Vienna Convention on the Law of Treaties, a State which, through notification of its accession, expresses its consent to be considered as bound by the Vienna Convention on Succession of States in Respect of Treaties to act in a singular case inconsistently with the rule contained in article 34 of that Convention, while in a great number of other cases to acting in full conformity with that rule*. These considerations, taken together, lead me to the conclusion that the Court should not attach any legal effect to the notification of accession by the Federal Republic of Yugoslavia to the Genocide Convention, and should instead consider it bound by that Convention on the basis of the operation of the customary rule of *ipso jure* succession codified in article 34 as applied to cases of the dissolution of a State."[2704]

(14) However, as guideline 5.1.8 below indicates, it is necessary to consider that the formulation of a reservation by a successor State, formed from a uniting or separation of States, in respect of which the treaty remains in force should be likened to the late formulation of a reservation.

(15) In contrast, the right to formulate new reservations that is recognized in the case of newly independent States in paragraph 2 of guideline 5.1.1 could be extended, it would seem, to successor States formed from a uniting or separation of States when their succession to a treaty is of a voluntary nature in that it occurs through a notification. Such is the case with respect to treaties which, on the date of the succession of States, were not in force for the predecessor State but to which it was a contracting State.[2705] In terms of the right to formulate new reservations, there is no reason to differentiate between those successor States and newly independent States to the extent that, in both cases, succession to the treaty involves an expression of intention on the part of the State concerned.

(16) Finally, paragraph 4 of guideline 5.1.2 recalls that any reservation formulated by a successor State formed from a uniting or separation of States, in accordance with paragraph 3 of this guideline, is subject to the conditions of permissibility set out in subparagraphs (a), (b) and (c) of guideline 3.1, which reproduces article 19 of the 1969 and 1986 Vienna Conventions. It also recalls that the relevant rules set out in Part 2 of the Guide to Practice apply in respect of that reservation. Paragraph 4 is the counterpart of paragraphs 2 and 3 of guideline 5.1.1.

5.1.3 Irrelevance of certain reservations in cases involving a uniting of States

When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State, such reservations as may have been formulated by any such State which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.

Commentary

(1) Unlike the separation of a State, where succession to a treaty results in the application of a single reservations regime to that treaty, a uniting of States entails a risk that two or more

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[2704] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, separate opinion of Judge Tomka, para. 35 (italics added).

[2705] See above, para. (4) of commentary to this guideline.

reservations regimes that may be different or even contradictory will apply to the same treaty. Such cases are not merely hypothetical. Nonetheless, the relevant practice does not seem to provide satisfactory answers to the many questions raised by this situation. For example, the aforementioned letter of 19 May 1990 from the Ministers for Foreign Affairs of the Yemen Arab Republic and the People's Democratic Republic of Yemen to the Secretary-General,[2706] in suggesting a solution to the technical problem of how the actions of the two predecessor States in relation to the same treaty should be recorded, referred to a time test whose legal scope appears uncertain in many respects and leaves unanswered the possible future question of the status of reservations formulated by the States concerned prior to the date of their union.

(2) In the case of a treaty which, at the date of a uniting of States, was in force in respect of any of the uniting States and continues in force in respect of the State so formed,[2707] guideline 5.1.2, paragraph 1, establishes the principle that any reservations to such a treaty that were formulated by any of the uniting States continue to apply to the unified State unless the latter expresses a contrary intention. The application of this presumption raises no difficulty provided that the uniting States were both either parties or contracting States to the treaty, in respect of which the treaty was not in force. However, the situation is more complicated if one of those States was a party to the treaty and the other was a contracting State in respect of which the treaty was not in force.

(3) It is this situation that the present guideline seeks to address: it provides only for the maintenance of reservations formulated by the State that was a party to the treaty. This solution is based on the fact that a State — in this case a State formed from a uniting of States — can have only one status in respect of a particular treaty: in this case that of a State party to the treaty (principle of *ipso jure* continuity). Thus, for a treaty that continues in force in respect of a State formed from a uniting of States, it seems logical to consider that only those reservations formulated by the State or States in respect of which the treaty was in force at the date of uniting of States may be maintained. Any reservations formulated by a contracting State in respect of which the treaty was not in force become irrelevant.

(4) Guideline 5.1.3[2708] is worded so as to cover not only the situations contemplated in articles 31 to 33 of the 1978 Convention, but also other situations involving the uniting of States in which one of the uniting States retains its international legal personality (a situation not covered by those provisions of the 1978 Vienna Convention).

5.1.4 Maintenance of the territorial scope of reservations formulated by the predecessor State

Subject to the provisions of guideline 5.1.5, a reservation considered as being maintained in conformity with guideline 5.1.1, paragraph 1, or guideline 5.1.2, paragraph 1 or

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[2706] The relevant text of this letter reads:

> "As concerns the treaties concluded prior to their union by the Yemen Arab Republic or the People's Democratic Republic of Yemen, the Republic of Yemen (as now united) is accordingly to be considered as a party to those treaties as from the date when one of these States first became a party to those treaties. Accordingly the tables showing the status of treaties will now indicate under the designation 'Yemen' the date of the formalities (signatures, ratifications, accessions, declarations and reservations, etc.) effected by the State which first became a party, those eventually effected by the other being described in a footnote" (in *Multilateral Treaties ..., Status of Treaties, Historical Information*, under "Yemen").

[2707] See article 31 of the 1978 Convention.

[2708] The same is true of guidelines 5.1.5 and 5.2.2.

3, shall retain the territorial scope that it had at the date of the succession of States, unless the successor State expresses a contrary intention.

Commentary

(1) It seems self-evident that a reservation considered as being maintained following a succession of States retains the territorial scope that it had at the date of the succession of States. This guideline sets out this principle, which follows logically from the idea of continuity inherent in the concept of succession to a treaty, whether it occurs *ipso jure* or by virtue of a notification of succession.

(2) Nonetheless, the successor State's freedom to express its intention to change the territorial scope of a reservation considered as being maintained should be recognized. That is the meaning of the phrase "unless the successor State expresses a contrary intention" with which this guideline ends. However, it is understood that a declaration by which a successor State expresses its intention to extend the territorial scope of a reservation considered as being maintained would not, by itself, affect the rights and obligations of other contracting States or contracting organizations.

(3) Furthermore, there are exceptions to the principle of the maintenance of the territorial scope of reservations considered as being maintained in certain situations involving the uniting of two or more States. These exceptions, which raise complex issues, are addressed in guideline 5.1.5 and are explicitly excluded from the scope of the present guideline.

(4) In addition, there is a need to address separately the problems that arise in relation to reservations in cases of succession involving part of a territory. While these cases do not constitute an exception to the principle established in the present guideline (as, in principle, the State that has acquired the territory in question does not in consequence succeed to the treaties by which the predecessor State was bound), they nonetheless require more specific treatment, which guideline 5.1.6 seeks to afford.

5.1.5 Territorial scope of reservations in cases involving a uniting of States

1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of only one of the States forming the successor State becomes applicable to a part of the territory of that State to which it did not apply previously, any reservation considered as being maintained by the successor State shall apply to that territory unless:

(a) the successor State expresses a contrary intention when making the notification extending the territorial scope of the treaty; or

(b) the nature or purpose of the reservation is such that the reservation cannot be extended beyond the territory to which it was applicable at the date of the succession of States.

2. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of two or more of the uniting States becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States, no reservation shall extend to that territory unless:

(a) an identical reservation has been formulated by each of those States in respect of which the treaty was in force at the date of the succession of States;

(b) the successor State expresses a different intention when making the notification extending the territorial scope of the treaty; or

(c) a contrary intention otherwise becomes apparent from the circumstances surrounding that State's succession to the treaty.

3. A notification purporting to extend the territorial scope of a reservation in accordance with paragraph 2 (b) shall be without effect if such an extension would give rise to the application of contradictory reservations to the same territory.

4. The provisions of paragraphs 1 to 3 apply *mutatis mutandis* to reservations considered as being maintained by a successor State that is a contracting State, following a uniting of States, to a treaty which was not in force for any of the uniting States at the date of the succession of States but to which one or more of those States were contracting States at that date, when the treaty becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States.

Commentary

(1) This guideline addresses the specific problems that can arise with respect to the territorial scope of reservations considered as being maintained following a uniting of two or more States. Paragraphs 1 to 3 deal with the case of a treaty that, following the uniting of States, remains in force, with reservations, in respect of the successor State. Paragraph 4 provides for the application *mutatis mutandis* of the same solutions to the case in which, following the uniting of States, the successor State is the contracting State to a treaty that was not in force for any of the predecessor States at the date of the uniting.

(2) The principle set out in guideline 5.1.4, namely that the territorial scope of a reservation considered as being maintained following a succession of States remains unchanged, applies also to cases involving the uniting of two or more States, albeit with certain exceptions, which are set out in this guideline. Such exceptions can occur when, following a uniting of two or more States, a treaty becomes applicable to a part of the territory of the unified State to which it did not apply at the date of the succession of States.

(3) Two possible situations should be distinguished in this connection:

- The situation in which, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of only one of the uniting States becomes applicable to a part of the territory of the successor State to which it did not apply previously; and
- The situation in which a treaty that was in force at the date of the succession of States in respect of two or more of the uniting States — but was not applicable to the whole of what was to become the territory of the successor State — becomes applicable to a part of the territory of the successor State to which it did not apply before the uniting.

(4) Paragraph 1 concerns the first situation, that is, where a treaty in force, with reservations, at the date of the succession of States for only one of the States that unite to form the successor State becomes applicable to a part of the territory of the unified State to which it did not apply at the date of the succession of States. Where the territorial scope of a treaty is thus extended by the successor State – which implies its consent (expressed either by a notification or in an agreement with other States parties),[2709] there is every reason to believe

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[2709] See article 31, para. 2, of the 1978 Vienna Convention.

that this extension concerns the treaty relationship as modified by the reservations formulated by the State in respect of which the treaty was in force at the date of the uniting. Paragraph 1, subparagraphs (a) and (b), however, provide for two exceptions:

- First, there is in principle nothing to prevent the State formed from a uniting of States, when it gives notification of the extension of the territorial scope of the treaty, from expressing a contrary intention in that regard and electing not to extend the territorial scope of the reservations. Paragraph 1 (a) establishes this possibility.
- Secondly, the reservation's nature or purpose may rule out its extension beyond the territory to which it was applicable at the date of the succession of States. This could be the case, in particular, of a reservation the application of which was already limited to a part of the territory of the State that formulated it, or a reservation that specifically concerns certain institutions belonging only to that State. Paragraph 1 (b) refers to this possibility.

(5) Paragraph 2 concerns, on the other hand, the second situation envisaged in paragraph (3) above, namely the case in which the treaty whose territorial scope is extended by the successor State was in force at the date of the succession of States in respect of at least two of the uniting States but was not at that time applicable to the whole of what was to become the territory of the unified State. The question, then, is whether reservations formulated by any of those States also become applicable to the parts of the territory of the unified State to which the treaty was not applicable at the date of the succession of States. In the absence of specific indications from the successor State, it may be unclear whether and to what extent that State, in extending the territorial scope of the treaty, meant to extend the territorial scope of the reservations formulated by one or another of the States in respect of which the treaty was in force at the date of the succession of States. Unless there are indications to the contrary, it appears reasonable to set out the presumption that none of those reservations extend to parts of the territory of the unified State to which the treaty was not applicable at the date of the succession of States. However, there is no reason not to regard this presumption as rebuttable. A different solution should apply:

- When an identical reservation has been formulated by each of the predecessor States in respect of which the treaty was in force, the situation referred to in paragraph 2 (a); in that case one should on the contrary presume that the unified State intends to maintain a reservation that is common to its predecessors and follow the logic reflected in paragraph 1 of this guideline;
- If a State formed from a uniting of States, when it accepts to extend the territorial scope of a treaty, expresses a different intention by specifying the reservations that will apply to the territory to which the treaty has been extended, the situation referred to in paragraph 2 (b); or
- If it becomes otherwise apparent from the circumstances that a State formed from a uniting of States intends to maintain reservations formulated by one of the States in particular, the situation referred to in paragraph 2 (c); this is the case, for example, when the unified State, upon extending the territorial scope of a treaty, refers specifically to formalities performed in respect of the treaty, prior to the date of the union, by one of the States concerned.

(6) In the case of identical reservations, referred to in paragraph 2 (a), the territorial extension of such a reservation to the part of the territory of the State formed from a uniting of States to which it did not apply before the date of succession of the States may, however, not be possible in some situations because of the nature or purpose of the reservation in question.

That situation is similar to the one envisaged in paragraph 1 (b). In the context of identical reservations, this situation may arise in the case of the uniting of more than two States, since it is conceivable that an identical reservation formulated by all of the predecessor States in respect of which the treaty was in force at the date of the succession of States could not be extended, because of its nature or its purpose, to the part of the territory of the successor State that, prior to the uniting of States, belonged to another uniting State in respect of which the treaty was not in force at the date of the succession of States. While aware of this possibility, the Commission did not mention it in the text of guideline 5.1.5 so as to avoid overburdening the text.

(7) In the situation contemplated in paragraph 2 (b), the decision of a unified State to extend the scope of various reservations to the territory concerned is acceptable only if those reservations, formulated by two or more of the uniting States, are compatible with each other. They may indeed be incompatible. In that situation, a declaration to that effect by the successor State cannot be regarded as having any effect if it would give rise to the application of contradictory reservations. This is the meaning of paragraph 3 of this guideline.

(8) The rules set out in paragraphs 1 to 3 concern the situation in which the treaty to which the predecessor States' reservation or reservations relate was in force in respect of at least one of them at the date of the succession of States. However, according to paragraph 4, they apply *mutatis mutandis* to reservations considered as being maintained by a unified State that extends the territorial scope of a treaty to which, following the succession of States, it is a contracting State when the treaty was not in force, at the date of the succession of States, in respect of any of the predecessor States even though one, or two or more, of the uniting States, respectively, had the status of a contracting party.[2710] In the same spirit, this solution should be applied to situations — undoubtedly rare, but provided for in article 32, paragraph 2, of the 1978 Vienna Convention — in which a treaty to which one or more of the uniting States were contracting States at the date of the succession of States enters into force after that date because the conditions provided for in the relevant clauses of the treaty have been met; in such a case, the successor State would become a party to the treaty.

(9) Lastly, concerning paragraph 4, it should also be recalled that the issue of the territorial scope of reservations formulated by a contracting State in respect of which the treaty was not in force at the date of the succession of States arises only if the treaty was not in force, on that date, for any of the uniting States; otherwise, the reservations formulated by that contracting State are not considered as being maintained.[2711]

5.1.6 Territorial scope of reservations of the successor State in cases of succession involving part of territory

When, as a result of a succession of States involving part of the territory of a State, a treaty to which the successor State is a contracting State becomes applicable to that territory, any reservation to the treaty formulated previously by that State shall also apply to that territory as from the date of the succession of States unless:

(a) the successor State expresses a contrary intention; or

(b) it appears from the reservation that its scope was limited to the territory of the successor State that was within its borders prior to the date of the succession of States, or to a part of this territory.

[2710] See article 32 of the 1978 Vienna Convention.

[2711] See guideline 5.1.3.

Commentary

(1) This guideline concerns cases involving the cession of territory or other territorial changes referred to in article 15 (Succession in respect of part of territory) of the 1978 Vienna Convention. This article provides that, as from the date of the succession of States, treaties of the successor State are in force in respect of the territory to which the succession of States relates, while treaties of the predecessor State cease to be in force in respect of that territory. This provision represents an extension of the rule, established in article 29 of the 1969 Vienna Convention on the Law of Treaties, concerning flexibility in the territorial application of treaties. Accordingly, guidelines 5.1.1 and 5.1.2 would not apply to situations falling under article 15 of the Convention because, in these cases, there is in principle no succession to treaties as such. While the State in question is referred to as a "successor State" within the meaning of article 2, paragraph 1 (d), of the 1978 Convention, in a manner of speaking it "succeeds" itself, and its status as a contracting State remains as it was when that State acquired it by expressing its own consent to be bound by the treaty in accordance with article 11 of the 1969 Vienna Convention.

(2) When this situation arises as a result of a succession involving part of a territory, the treaty of the successor State is extended to the territory in question. In this case, it seems logical to consider that the treaty's application to that territory is subject, in principle, to the reservations which the successor State itself had formulated to the treaty.

(3) Here again, however, this principle should be qualified by two exceptions, also based on the principle of consent so prevalent in the law of treaties in general and of reservations in particular. Accordingly, a reservation should not extend to the territory to which the succession relates:

- when the successor State expresses a contrary intention (subparagraph (a)); this case can be likened to a partial withdrawal of the reservation, limited to the territory to which the succession of States relates;[2712] or
- when it appears from the reservation itself that its scope was limited to the territory of the successor State that was within its borders prior to the date of the succession of States, or to a part of that territory (subparagraph (b)).

(4) Guideline 5.1.6 is formulated so as to cover not only treaties in force for the successor State at the time of the succession of States, but also treaties not in force for the successor State on that date but to which it is a contracting State, a situation not covered by article 15 of the 1978 Vienna Convention. The verb "apply" in relation to such a treaty should be understood as encompassing both situations, which need not be distinguished from one another in this context in relation to the question of reservations.

(5) However, this guideline does not apply to "territorial treaties" (concerning a border regime or other regime relating to the use of a specific territory). If a succession occurs in relation to such a treaty,[2713] the solutions provided for in guideline 5.1.2 concerning the uniting or separation of States apply *mutatis mutandis* to reservations formulated in respect of that treaty.

[2712] On the partial withdrawal of a reservation, see guidelines 2.5.10 and 2.5.11 and commentaries thereto.

[2713] For international jurisprudence on this point, see *inter alia* the Permanent Court of International Justice, Order of 6 December 1930, in the case concerning *Free Zones of Upper Savoy and the District of Gex*, Publications of the Permanent Court of International Justice, *Collection of Judgments*, Series A, No. 24, p. 17, and Judgment of 7 June 1932 in the same case, Series A/B, No. 46, p. 145.

5.1.7 Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State

The non-maintenance, in conformity with guideline 5.1.1 or 5.1.2, by the successor State of a reservation formulated by the predecessor State becomes operative in relation to another contracting State or a contracting organization only when notice of it has been received by that State or organization.

Commentary

(1) Article 20 of the 1978 Vienna Convention does not directly address the effects *ratione temporis* of a declaration whereby a newly independent State announces, when notifying its succession to a treaty, that it is not maintaining a reservation formulated by the predecessor State; even less does it clarify the issue in the context of a succession of States resulting from a uniting or separation of States, as the 1978 Convention does not specify the status of the predecessor State's reservations in that context. Neither practice nor the literature seems to provide a clear answer to this question, which could nonetheless be of some practical importance.

(2) Whether resulting from the expression of a "contrary intention" or from the successor State's formulation of a reservation that "relates to the same subject matter" as a reservation formulated by the predecessor State,[2714] it seems reasonable, in relation to its effects *ratione temporis*, to treat the non-maintenance of a reservation following a succession of States as a withdrawal of the reservation in question and to consider it subject, as such, to the ordinary rules of the law of treaties, codified in article 22 of the 1969 and 1986 Vienna Conventions. Pursuant to paragraph 3 (a) of that article, "unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State".

(3) This guideline reproduces *mutatis mutandis* the rule set out in article 22, paragraph 3 (a), of the 1969 Vienna Convention and reflected in guideline 2.5.8 concerning the effects *ratione temporis* of the withdrawal of a reservation: this solution, which is particularly important when succession to the treaty (and to the reservation) takes place *ipso jure*, seems to lend itself to all types of succession: not until they are aware of the successor State's intention (by means of a written notification)[2715] can the other parties take the withdrawal into account.

5.1.8 Late formulation of a reservation by a successor State

A reservation shall be considered as late if it is formulated:

(a) by a newly independent State after it has made a notification of succession to the treaty;

(b) by a successor State other than a newly independent State after it has made a notification establishing its status as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State; or

(c) by a successor State other than a newly independent State in respect of a treaty which, following the succession of States, continues in force for that State.

[2714] See para. 1 of guideline 5.1.1 and paras. 1 and 3 of guideline 5.1.2 above.

[2715] See guideline 2.5.2 on form of withdrawal of a reservation and commentary thereto.

Commentary

(1) The right of a newly independent State to formulate reservations to a treaty to which it intends to succeed is not in doubt, nor is the right of other successor States to formulate reservations in respect of a treaty that was not in force at the date of the succession of States.[2716] However, that right ought not to be unlimited in time. This guideline deals with three situations in which a reservation formulated by a successor State should be subject to the legal regime for late reservations, as set out in guidelines 2.3, 2.3.1, 2.3.2 and 2.3.4. In this respect, it should be recalled that guideline 2.3 provides that the late formulation of a reservation is permitted only if none of the contracting States and contracting organizations objects, thereby fully upholding the principle of consent.

(2) The first situation is referred to in subparagraph (a). It concerns reservations that a newly independent State might formulate after it has made a notification of succession. It seems reasonable to consider that if the newly independent State intends to exercise its right to formulate reservations to the treaty to which it is succeeding, it should do so when it makes a notification of succession. This is clearly implied by the very definition of reservations contained in guideline 1.1 of the Guide to Practice, which, like article 2, paragraph 1 (j), of the 1978 Vienna Convention — and unlike article 2, paragraph 1 (d), of the 1969 Convention on the Law of Treaties — mentions among the temporal elements included in the definition of reservations the time "when [a State is] making a notification of succession to a treaty".[2717] It seems legitimate to conclude from this that reservations formulated by a newly independent State after that date should be considered as late within the meaning of the guidelines referred to in the previous paragraph of this commentary.

(3) For similar reasons, it seems that the regime for late reservations should apply to the reservations referred to under subparagraph (b) formulated by a successor State other than a newly independent State after the date on which it has established, by a notification to that effect, its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State, under the conditions stipulated in guideline 5.1.2, paragraph 3. As in that provision, the term "predecessor State" should be understood here, in cases involving a uniting of States, to mean one or more of the predecessor States.

(4) In fact, the same solution should also apply to any reservation formulated by a successor State other than a newly independent State to a treaty which, following the succession of States, continues in force for that State. In such a case, guideline 5.1.2, paragraph 2, does not recognize a right on the part of the successor State to formulate reservations that had not been formulated by the predecessor State. Nonetheless, should the successor State formulate a new reservation to the treaty in question, there are no grounds for treating that State differently from any other State by denying it the benefit of the legal regime for late reservations.[2718]

[2716] See para. 2 of guideline 5.1.1 and para. 3 of guideline 5.1.2.

[2717] The full definition of reservations in paragraph 1 of guideline 1.1 reads as follows:

> "'Reservation' means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty *or by a State when making a notification of succession to a treaty*, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization". On the reasons for the inclusion of this reference to the succession of States in guideline 1.1, see paragraphs (5) and (6) of the commentary to that guideline.

[2718] See the commentary to guideline 5.1.2 above.

5.2 Objections to reservations in cases of succession of States

5.2.1 Maintenance by the successor State of objections formulated by the predecessor State

Subject to the provisions of guideline 5.2.2, a successor State shall be considered as maintaining any objection formulated by the predecessor State to a reservation formulated by a contracting State or contracting organization, unless it expresses a contrary intention at the time of the succession.

Commentary

(1) This guideline and guidelines 5.2.2 to 5.2.6 seek to fill gaps in the 1978 Vienna Convention. That Convention does not deal with objections to reservations (nor with acceptances of reservations) in relation to the succession of States. The Commission itself had decided to leave the question of objections open despite a partial proposal by Waldock.[2719] Notwithstanding a request to that effect from the representative of the Netherlands[2720] and some concerns expressed at the Vienna Conference about this gap in the Convention,[2721] the gap was allowed to remain.

(2) That was a deliberate stance, as explained at the Conference by Yasseen, Chairman of the Drafting Committee: "The Drafting Committee had paid particular attention to the question of objections to reservations and objections to such objections, which had been raised by the Netherlands representative. It had noted that, as was clear from the Commission's commentary to article 19, particularly paragraph (15) (A/CONF.80/4, p. 66),[2722] the article did not deal with that matter, which was left to be regulated by general international law."[2723]

(3) Draft article 19 (the forerunner of article 20 of the 1978 Convention), as adopted by the Commission on second reading in 1974, also did not address the question of objections to reservations in the context of succession of States. Here again, the omission was deliberate; in the commentary to this provision, the Commission noted that:

> it would be better, in accordance with its fundamental method of approach to the draft articles, to leave these matters to be regulated by the ordinary rules applicable to acceptances and objections on the assumption that, unless it was necessary to make some particular provision in the context of the succession of States, the newly independent State would "step into the shoes of the predecessor State".[2724]

These last words could imply that the Commission considered that the transmission of objections should be the rule.[2725]

(4) In order to justify its silence on the question of objections to reservations, the Commission invoked an argument based on their legal effects. It noted, on the one hand, that

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[2719] See below para. (5) of the commentary to this guideline.

[2720] A/CONF.80/16, 27th meeting of the Committee of the Whole, para. 70; 28th meeting of the Committee of the Whole, para. 32; and 35th meeting of the Committee of the Whole, para. 19.

[2721] See A/CONF.80/16, 27th meeting of the Committee of the Whole, para. 85 (Madagascar).

[2722] See below para. (3) of this commentary.

[2723] A/CONF.80/16, 35th meeting of the Committee of the Whole, para. 17.

[2724] *Yearbook ... 1974*, vol. II, Part One, p. 226, para. (15) of the commentary; see also para. (23), at p. 227. This explanation was recalled at the 1977–1978 Vienna Conference by Sir Francis Vallat, acting as an expert consultant; see A/CONF.80/16, 27th meeting of the Committee of the Whole, para. 83.

[2725] In this regard, see P.-H. Imbert, footnote 25 above, p. 320, note 126.

unless the objecting State has definitely indicated that by its objection it means to preclude the entry into force of the treaty as between the reserving State and the objecting State, the legal position created by an objection to a reservation is "much the same as if no objection had been lodged";[2726] and, on the other, that if such an indication is given, the treaty will not have been in force at all between the predecessor State and the reserving State at the date of the succession.[2727] This also implies that the Commission considered that the prior (maximum-effect) objections of the predecessor State continued to apply.

(5) This was, moreover, the position of Waldock, who, while highlighting the scarcity of practice in this regard, had suggested, again along the lines of the proposals put forward by O'Connell to the International Law Association,[2728] that the rules regarding reservations should apply *mutatis mutandis* to objections.[2729] In particular, that meant that the same presumption that the Commission would later make with respect to reservations formulated by newly independent States in its draft article 19, paragraph 1, which was reproduced in article 20, paragraph 1, of the 1978 Vienna Convention, would apply to objections.[2730] The second Special Rapporteur on the topic, Vallat, also supported the presumption in favour of the maintenance of objections formulated by the predecessor State: "on the whole, the reasoning which supports the retention of the presumption in favour of the maintenance of reservations also supports the presumption in favour of the maintenance of objections which is inherent in the present draft", especially, he stressed, since in any event it would "always be open to the successor State to withdraw the objection if it wishes to do so". Nonetheless, Vallat considered that there seemed to be "no need to complicate the draft by making express provisions with respect to objections".[2731]

(6) Already noted 35 years ago by Gaja,[2732] the dearth of practice in this area is still apparent. It should be noted, however, that certain elements of recent practice also seem to support the maintenance of objections.[2733] Mention should be made of a number of cases in which a newly independent State, in notifying its succession, confirmed the objections made

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[2726] See above, however, guidelines 4.3 and 4.3.1 to 4.3.8 and the commentaries thereto.

[2727] Commentary to article 19, *Yearbook ... 1974*, vol. II, Part One, p. 226, para. (14). This reasoning is supported by J.M. Ruda, footnote 56 above, pp. 207–208. See, however, the critical remarks of Jan Klabbers, "State succession and reservations to treaties", in Jan Klabbers and René Lefeber (eds.), *Essays on the Law of Treaties. A Collection of Essays in Honour of Bert Vierdag* (The Hague/Boston/London: Nijhoff, 1998), pp. 109–110.

[2728] *Op. cit.*, footnote 2641 above, "Additional point" No. 13: "Since a new State takes over the legal situation of its predecessor, it takes over the consequences of its predecessor's objections to an incompatible reservation made to a multilateral convention by another party. Therefore the reservation would not be effective against the new State unless the latter formally waives the objection", quoted in the second report of Sir Humphrey Waldock, *Yearbook ... 1969*, vol. II, p. 49, para. 17.

[2729] See draft article 9, para. 3 (*a*), contained in his third report: "The rules laid down in paragraphs 1 and 2 regarding reservations apply also, *mutatis mutandis*, to objections to reservations"; *Yearbook ... 1970*, vol. II, p. 47.

[2730] See para. 1 of guideline 5.1.1 above.

[2731] First report, *Yearbook ... 1974*, vol. II, Part One, p. 54, para. 289.

[2732] G. Gaja., footnote 2648 above, p. 56.

[2733] See, in this sense, Renata Szafarz, "Vienna Convention on Succession of States in respect of Treaties: A General Analysis", *Polish Yearbook of International Law*, vol. X (1980), p. 96. G. Gaja, meanwhile, takes the view that practice does not contradict the presumption in favour of the maintenance of objections formulated by the predecessor State, but also does not suffice to support this presumption (footnote 2648 above, p. 57).

by the predecessor State to reservations formulated by States parties to the treaty.[2734] There have also been a few cases in which objections formulated by the predecessor State have been withdrawn and, at the same time, new objections have been formulated.[2735] With respect to successor States other than newly independent States, it may be noted, for example, that Slovakia explicitly maintained the objections made by Czechoslovakia to reservations formulated by other parties to the treaties to which it succeeded.[2736] Similarly, the Federal Republic of Yugoslavia stated that it maintained the objections made by the former Yugoslavia,[2737] and Montenegro stated that it maintained the objections made by Serbia and Montenegro.[2738]

(7) It is not immediately clear how this recent practice should be interpreted: it leans in the direction of continuity but could also reflect the absence of a set rule; otherwise, such statements would have been unnecessary.[2739] It nevertheless seems reasonable and logical to revert, in guideline 5.2.1, to the solution proposed by Waldock, who suggested that the rules regarding reservations should apply *mutatis mutandis* to objections,[2740] bearing in mind that, even though the Commission ultimately opted not to include in its draft articles a provision dealing specifically with objections to reservations, the solution proposed by the Special Rapporteur did not give rise to any substantive objections in the Commission.

(8) Like the presumption in favour of the maintenance of reservations, established in article 20, paragraph 1, of the 1978 Vienna Convention, the presumption in favour of the maintenance of objections is warranted for both newly independent States and other successor States. However, there are exceptions to the presumption in favour of the maintenance of objections in certain cases involving the uniting of two or more States, which are referred to in guideline 5.2.2.

(9) Although it refers generally to "a successor State", *i.e.* a State that replaces another in the responsibility for the international relations of the territory,[2741] guideline 5.2.1 refers only to cases whereby a successor State acquires its status as a contracting State to a treaty by succession, regardless of whether this succession occurs *ipso jure* or through notification. Conversely, the presumption set out in this guideline does not apply to situations in which a successor State that does not succeed *ipso jure* to a treaty decides to become a contracting State to that treaty by means other than making a notification of its succession, for instance by acceding to it within the meaning of article 11 of the 1969 Vienna Convention.

[2734] *Multilateral Treaties* ..., chap. III.3, Vienna Convention on Diplomatic Relations: Malta repeated, upon succession, some of the objections formulated by the United Kingdom, and Tonga indicated that it "adopted" the objections made by the United Kingdom with respect to the reservations and statements made by Egypt; chap. XXI.1, Convention on the Territorial Sea and the Contiguous Zone, and chap. XXI.2, Convention on the High Seas (Fiji); chap. XXI.4, Convention on the Continental Shelf (Tonga).

[2735] *Ibid.*, chap. XXI.2, Convention on the High Seas (Fiji).

[2736] See above, footnote 2688.

[2737] See above, footnote 2689.

[2738] See above, footnote 2690.

[2739] The same could be said of a number of the clarifications proposed under Part 5 of the Guide to Practice, but the case at hand is especially striking, owing to the extreme scarcity of precedents.

[2740] See above para. (5) of the commentary to this guideline.

[2741] See the definitions of "succession of States" and "successor State" contained, respectively, in art. 2, paras. 1 (*b*) and (*d*), of the 1978 Vienna Convention.

5.2.2 Irrelevance of certain objections in cases involving a uniting of States

1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the State so formed, such objections to a reservation as may have been formulated by any of those States in respect of which the treaty was not in force on the date of the succession of States shall not be maintained.

2. When, following a uniting of two or more States, the successor State is a contracting State to a treaty to which it has maintained reservations in conformity with guideline 5.1.1 or 5.1.2, objections to a reservation made by another contracting State or a contracting organization shall not be maintained if the reservation is identical or equivalent to a reservation which the successor State itself has maintained.

Commentary

(1) Guideline 5.1.3 (Irrelevance of certain reservations in cases involving a uniting of States), sets out the exception that must qualify the principle of the maintenance of the predecessor State's reservations in certain situations that may arise in connection with the uniting of two or more States. Such situations arise when, at the date of the succession of States, a treaty in force for one of the predecessor States continues in force for the State formed from a uniting of States: in these circumstances, the reservations formulated by a predecessor State that, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.[2742]

(2) As the same causes produce the same effects, guideline 5.2.1, which sets out the principle that the successor State is presumed to maintain the predecessor State's objections to reservations formulated by other contracting States or contracting international organizations to a treaty to which it has succeeded, should be qualified by the same exception when the above-mentioned situations arise. Paragraph 1 of this guideline specifies that when a treaty continues in force in respect of a unified State, objections to a reservation formulated one of the uniting States which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.

(3) Provision may, however, be made for another situation, one that is specific to objections, by establishing a second exception to the principle laid down in guideline 5.2.1. Paragraph 2 of guideline 5.2.2 sets out this exception, which is justified on logical grounds and relates to the fact that a successor State cannot maintain both a reservation formulated by one of the uniting States and, at the same time, objections made by another such State to an identical or equivalent reservation formulated by a contracting State that is a third State in relation to the succession of States.

5.2.3 Maintenance of objections to reservations of the predecessor State

When a reservation formulated by the predecessor State is considered as being maintained by the successor State in conformity with guideline 5.1.1 or 5.1.2, any objection to that reservation formulated by another contracting State or by a contracting organization shall be considered as being maintained in respect of the successor State.

[2742] See the commentary to guideline 5.1.3.

Commentary

(1) This guideline sets out the presumption in favour of the maintenance of objections formulated by a contracting State or a contracting organization in relation to reservations of the predecessor State that are considered as being maintained by the successor State in conformity with guidelines 5.1.1 and 5.1.2.

(2) This presumption seems to be called for. It would be difficult to explain why a contracting State or a contracting organization should have to reiterate an objection it has already formulated with respect to a reservation of the predecessor State that applied to the territory to which the succession of States relates.[2743] The author of the objection will always have the right to withdraw its objection if it does not wish to maintain it in respect of the successor State.

(3) The presumption in favour of the maintenance of objections to reservations of the predecessor State that are maintained by the successor State also finds support in the views expressed by certain delegations at the 1977–1978 Vienna Conference. For example, the representative of Japan indicated that his delegation could go along with the International Law Commission's text of draft article 19 on the understanding that "a State party which had objected to the original reservation which had been made by the predecessor State did not need to repeat the objection with regard to the successor State".[2744] A similar view was expressed by the representative of the Federal Republic of Germany, who considered, with respect to both newly independent States and other successor States, that "the successor State was bound *ipso jure* by the individual treaty relationship created by the predecessor State, including the reservations and other declarations made by that State *and the objections thereto entered by its treaty partners*".[2745]

5.2.4 Reservations of the predecessor State to which no objections have been made

When a reservation formulated by the predecessor State is considered as being maintained by the successor State in conformity with guideline 5.1.1 or 5.1.2, a State or an international organization that had not formulated an objection to the reservation in respect of the predecessor State may not object to it in respect of the successor State, unless:

(a) the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period; or

(b) the territorial extension of the treaty radically changes the conditions for the operation of the reservation.

Commentary

(1) This guideline addresses the situation where a contracting State has not objected in time to a reservation formulated by a predecessor State and considered as being maintained by the successor State after a succession of States. In these circumstances, it would be difficult to conceive why such a tacit acceptance of the reservation should be called into question merely because a succession of States has taken place. Accordingly, the guideline excludes, in principle, the right of a contracting State to object, in respect of a successor State, to a

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[2743] See Gaja, footnote 2648 above, p. 67, and the memorandum by the Secretariat, footnote 2621, para. 37.

[2744] A/CONF.80/16, 28th meeting of the Committee of the Whole, paras. 15 and 16.

[2745] A/CONF.80/16, 43rd meeting of the Committee of the Whole, para. 11 (italics added).

reservation to which it had not objected in respect of the predecessor State. However, there are two possible exceptions.

(2) The first exception, addressed in subparagraph (a), concerns the case in which the succession of States takes place prior to the expiry of the time period during which a contracting State could have objected to a reservation formulated by the predecessor State.[2746] In such a situation, the right of a contracting State or contracting international organization to formulate an objection up until the expiry of that period should be recognized.

(3) The second exception, addressed in subparagraph (b), concerns the case in which "the territorial extension of the treaty radically changes the conditions for the operation of the reservation". This hypothesis may be realized in the situations dealt with in guideline 5.1.5, in which the territorial scope of a reservation is extended because of the extension of the territorial scope of the treaty itself following a uniting of States. Even in such a situation, in order for a State or international organization that has not objected in time to the reservation prior to the date of the succession of States to be able to object to it, it would be necessary that the maintenance of the reservation the territorial scope of which has been extended should upset the balance of the treaty: that is the sense of the restrictive formulation of this exception, which covers only those situations in which the territorial extension of the reservation "radically changes the conditions for the operation of the reservation".

5.2.5 Right of a successor State to formulate objections to reservations

1. When making a notification of succession establishing its status as a contracting State, a newly independent State may, in accordance with the relevant guidelines, formulate an objection to reservations formulated by a contracting State or a contracting organization, even if the predecessor State made no such objection.

2. A successor State, other than a newly independent State, shall also have the right provided for in paragraph 1 when making a notification establishing its status as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State.

3. The right referred to in paragraphs 1 and 2 is nonetheless excluded in the case of treaties falling under guidelines 2.8.7 and 4.1.2.

Commentary

(1) This guideline concerns the right of the successor State to formulate objections to reservations formulated in respect of a treaty to which it becomes a contracting State following a succession of States. As in other guidelines, it is necessary to distinguish in that regard two different situations, which call for different solutions:

(2) In this guideline, the term "right" has the same meaning and is used for the same reasons as in guideline 2.6.2. (Right to formulate objections).

- On the one hand, cases where a successor State is free to decide whether or not to succeed to a treaty and establishes its status as a contracting State when notifying its succession; and
- On the other hand, cases of "automatic succession" in which the successor State "inherits" an existing treaty without being called upon to express its consent.

[2746] See guideline 2.6.1.2 and commentary thereto.

Guideline 5.2.5 covers only the first hypothesis, while guideline 5.2.6 covers the second.

(3) The hypothesis covered by guideline 5.2.5 in turn encompasses two different situations:

- The situation, dealt with in paragraph 1, of a newly independent State making a notification of succession;[2747]
- The situation, dealt with in paragraph 2, of a successor State other than a newly independent State which, by making a notification to that effect, establishes its status as a contracting State to a treaty which, at the date of succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State.

(4) In both cases envisaged in the guideline, the successor State has the choice as to whether or not to become bound by the treaty. That being the case, there is no reason in principle why it cannot formulate new objections when establishing its status as a contracting State by a notification pursuant to paragraph 1 of guideline 5.1.1 or paragraph 3 of guideline 5.1.2. That is the solution set out for each of those two situations in paragraphs 1 and 2, respectively, of guideline 5.2.5.

(5) Waldock had briefly considered this issue in his third report on the succession of States in respect of treaties and took the view that, "whenever a successor State becomes a party not by inheritance but by an independent act establishing its consent to be bound, logic would indicate that it should be wholly responsible for its own reservations, acceptances and objections, and that its relation to any reservations, acceptances and objections of its predecessor should be the same as that of any other new party to the treaty".[2748] It does indeed seem logical to apply to objections the same reasoning that underlies guidelines 5.1.1, paragraph 2, and 5.1.2, paragraph 3, concerning the formulation of reservations by a successor State. Since, in the cases considered here, succession to a treaty takes place only by virtue of a deliberate act on the part of the successor State (a "notification of succession" or, in the case of successor States other than newly independent States, a "notification"), the successor State should be free to modify its treaty obligations, not only by formulating reservations but also, if it so desires, by objecting to reservations formulated by other States even before the date of its succession to the treaty.[2749]

(6) Moreover, while practice in this area is scarce, there have been cases in which newly independent States have formulated new objections when notifying their succession to a treaty. For example, Fiji withdrew objections made by the predecessor State and formulated new objections upon making a notification of succession to the 1958 Geneva Convention on the High Seas.[2750]

(7) Paragraph 3 of the guideline, however, states an exception to the right of the successor State to formulate objections that is recognized in paragraphs 1 and 2. The exception concerns the situations covered by article 20, paragraph 2, of the 1969 and 1986 Vienna Conventions — the content of which is reproduced in guideline 4.1.2 — in which a reservation to the treaty must be accepted by all parties. The exception was proposed by Waldock in his third report;

[2747] See articles 17 and 18 of the 1978 Vienna Convention, the text of which is reproduced above in footnote 2635.

[2748] *Yearbook ... 1970*, vol. II, p. 47, para. (2) of the commentary to draft article 9; see also para. (5) of the commentary to guideline 5.2.1 above.

[2749] In this regard, in the case of newly independent States, see G. Gaja, footnote 2648 above, p. 66.

[2750] See footnote 2735 above.

draft article 9, paragraph 3, which established the principle that the same rules should apply to both objections and reservations, included a subparagraph (b) worded as follows:

> (b) However, in the case of a treaty falling under article 20, paragraph 2, of the Vienna Convention, no objection may be formulated by a new State to a reservation which has been accepted by all the parties to the treaty.[2751]

This exception is intended to ensure that a successor State cannot, by formulating an objection, compel the reserving State to withdraw from such a treaty. It is also consistent with guideline 2.8.7 (Unanimous acceptance of reservations), to which paragraph 3 refers.

(8) The brevity of the reference in paragraph 1 of the guideline to "the relevant guidelines" is warranted by the fact that it would be difficult if not impossible to give an exhaustive list in the guideline itself of all the guidelines applicable to the formulation of objections. For the most part the relevant guidelines are contained in section 2.6 of the Guide to Practice concerning the formulation of objections.

(9) Among those guidelines particular attention should be paid to guideline 2.6.12, which reproduces the temporal requirement set forth in article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions. In the case of an objection by a successor State to a prior reservation, the application of the time limit leads to the conclusion that the successor State has a period of twelve months from the date it has established by notification its status as a contracting State within which to formulate the objection. In view of the voluntary nature of succession in the cases contemplated by the present guideline, it is not until the successor State establishes its status as a contracting State that it can be expected to inquire into all the reservations that have been formulated to the treaty and to examine them in order to decide whether or not it intends to object. In that light, it would appear, then, to be in keeping with the spirit of article 20, paragraph 5, of the 1969 Vienna Convention as reproduced in guideline 2.6.12 to allow successor States that fall under guideline 5.2.5 a time period of twelve months from the date of notification of their succession to the treaty.

5.2.6 Objections by a successor State other than a newly independent State in respect of which a treaty continues in force

A successor State, other than a newly independent State, in respect of which a treaty continues in force following a succession of States may not formulate an objection to a reservation to which the predecessor State had not objected, unless the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period.

Commentary

(1) This guideline, which deals with a situation excluded from the scope of guideline 5.2.5, applies to a successor State other than a newly independent State when, following a uniting or separation of States, a treaty remains in force in respect of that State in the context of a succession that can be termed "automatic", that is, when a treaty remains in force following a succession of States in respect of a successor State other than a newly independent State even though there has been no expression of consent by that State. Under Part IV of the 1978 Vienna Convention, such a situation arises, in principle, in the case of a State formed from a

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[2751] *Yearbook ... 1970*, vol. II, p. 47; see also the explanation of the grounds for this proposal, *ibid.*, pp. 56 and 57, para. (17) of the commentary to draft article 9.

uniting of two or more States in relation to treaties in force at the date of the succession of States in respect of any of the predecessor States.[2752] The same is true of a State formed from a separation of States in relation to treaties in force at the date of the succession of States in respect of the entire territory of the predecessor State, as well as treaties that were in force in respect only of that part of the territory of the predecessor State that corresponds to the territory of the successor State.[2753]

(2) Since, in the situations contemplated in the present guideline, the succession to the treaty does not depend on an expression of intent on the part of the State formed from the uniting or separation of States, that State inherits all of the predecessor State's rights and obligations under the treaty,[2754] including objections (or the absence thereof) that the predecessor State had (or had not) formulated in respect of a reservation to the treaty. As one author has written, "When … succession is considered to be automatic, the admissibility of objections on the part of the successor State must be ruled out … if the predecessor State had accepted the reservation, such consent cannot be subsequently revoked either by the same State or by its successor."[2755] It does not appear, moreover, that successor States other than newly independent States have claimed the right to formulate objections to reservations to which the predecessor State had not objected.[2756]

(3) As in the case of guideline 5.2.4 (Reservations of the predecessor State to which no objections have been made), an exception should nonetheless be made for cases in which a succession of States takes place prior to the expiry of the time period during which the predecessor State could have objected to a reservation formulated by another contracting State or party to the treaty. In such a situation, recognizing the successor State's right to formulate an objection to such a reservation up until the expiry of that period seems warranted.[2757]

5.3 Acceptances of reservations in cases of succession of States

5.3.1 Maintenance by a newly independent State of express acceptances formulated by the predecessor State

When a newly independent State establishes its status as a contracting State to a treaty, it shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization, unless it expresses a contrary intention within twelve months of the date of the notification of succession.

Commentary

(1) This guideline deals with the status of express acceptances formulated by the predecessor State. In the case of tacit acceptances by a predecessor State which did not object to a reservation in time prior to the date of the succession of States, the applicable rules are set out in guidelines 5.2.5 and 5.2.6.

[2752] See article 31 of the Convention.

[2753] See article 34 of the Convention.

[2754] See the commentary to paras. 1 and 2 of guideline 5.1.2.

[2755] G. Gaja, footnote 2648 above, p. 67.

[2756] The memorandum by the Secretariat cited in footnote 2621 above does not mention any cases in which a successor State formed from a uniting or separation of States has formulated objections to reservations to which the predecessor State had not objected.

[2757] See also para. (2) of the commentary to guideline 5.2.4.

(2) As with reservations and objections, the question of the status of express acceptances formulated by a predecessor State calls for an approach that varies, at least in part, according to whether the succession to the treaty occurs through a notification by the successor State or *ipso jure*.

(3) In the case of newly independent States, succession to a treaty occurs by virtue of a notification of succession.[2758] In this context, article 20, paragraph 1, of the 1978 Vienna Convention, reproduced in guideline 5.1.1, paragraph 1, establishes the presumption in favour of the newly independent State's maintenance of the predecessor State's reservations unless, when making the notification of succession, the newly independent State expresses a contrary intention or formulates a reservation which relates to the same subject matter as the reservation of the predecessor State. The Commission is of the view that, although practice regarding express acceptances of reservations in connection with the succession of States appears to be non-existent, the presumption in favour of the maintenance of reservations should logically be transposed to express acceptances.

(4) By analogy, it also seems appropriate to recognize the right of the newly independent State to express its intention not to maintain an express acceptance formulated by the predecessor State in respect of a reservation. That right does not constitute a derogation from the general rule regarding the final nature of acceptance of a reservation, set forth in guideline 2.8.13: the voluntary nature of succession to the treaty by the newly independent State justifies this apparent derogation, just as it justifies the newly independent State's right to formulate new reservations when making its notification of succession to the treaty,[2759] as recognized in article 20, paragraph 2, of the 1978 Vienna Convention, or the right of such a State to formulate objections to reservations that were formulated prior to the date of the notification of succession as recognized in guideline 5.2.5.

(5) However, the question of the time period within which the newly independent State may express its intention not to maintain an express acceptance by the predecessor State remains to be addressed. With respect to the non-maintenance of a reservation made by the predecessor State, article 20, paragraph 1, of the 1978 Vienna Convention requires that the newly independent State must express its intention to that effect when making its notification of succession to the treaty. Does the same requirement apply with respect to the non-maintenance of an express acceptance? In the latter case, logic suggests that, by analogy, the approach taken with regard to a newly independent State's formulation of an objection to a reservation formulated prior to the date of the notification of succession should be followed. In fact, it appears that the potential effects of non-maintenance of an express acceptance can be likened, to a great extent, to those of the formulation of a new objection. Consequently, guideline 5.3.1 on the maintenance by a newly independent State of the express acceptances formulated by the predecessor State should be based on the rule applicable to the formulation of an objection by the successor State, and twelve months should be retained as the time period within which the newly independent State may express its intention not to maintain an express acceptance formulated by the predecessor State.[2760] Whereas guideline 5.2.5 concerning objections formulated by a successor State merely refers in that connection to the "relevant guidelines", which of course include the temporal requirement mentioned, in the case of the present guideline it is not sufficient to refer to general rules, since the question of the maintenance or non-maintenance by the successor State of an express acceptance of a reservation made by the predecessor State does not arise except in relation to the succession of

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[2758] See para. (4) of the commentary to guideline 5.1.1, footnote 2635 above and accompanying text.

[2759] See guideline 5.1.1, para. (2).

[2760] See para. (9) of the commentary to guideline 5.2.5.

States. It is thus appropriate to stipulate expressly a period of twelve months, on the basis of the approach taken with respect to the formulation of an objection by a successor State.

(6) A newly independent State's expression of its intention on this matter may be conveyed either through its explicit withdrawal of the express acceptance formulated by the predecessor State, or through the formulation by a newly independent State of an objection to the reservation which had been expressly accepted by the predecessor State, the content of which objection would be incompatible, in whole or in part, with that acceptance.

5.3.2 Maintenance by a successor State other than a newly independent State of express acceptances formulated by the predecessor State

1. A successor State, other than a newly independent State, in respect of which a treaty continues in force following a succession of States shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization.

2. When making a notification of succession establishing its status as a contracting State to a treaty which, on the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State, a successor State other than a newly independent State shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization, unless it expresses a contrary intention within twelve months of the date of the notification of succession.

Commentary

(1) In the case of successor States other than newly independent States, the question of the status of express acceptances formulated by the predecessor State calls for a more nuanced approach. It is necessary to distinguish situations in which succession occurs *ipso jure* from those in which it occurs through notification.

(2) The first situation is governed by paragraph 1 of the present guideline. It arises, in cases involving the uniting or separation of States, with respect to treaties which, on the date of the succession of States, were in force for the predecessor State and remain in force for the successor State.[2761] Guideline 5.2.6 provides that in such a situation the successor State does not have the right to formulate an objection to a reservation to which the predecessor State did not object in a timely manner. *A fortiori*, such a successor State does not have the right to call into question an express acceptance formulated by the predecessor State.

(3) On the other hand, matters are different in the situation covered by paragraph 2 of the present guideline, in which succession to a treaty by a State formed from the uniting or separation of States occurs only through notification to that effect – as is the case with treaties which on the date of the succession of States were not in force for the predecessor State but to which it was a contracting State. In that situation — as for the formulation of new reservations[2762] and new objections[2763] — such other successor States must be recognized as having the same right that newly independent States have under guideline 5.3.1.

[2761] See the commentary to guideline 5.1.2 above, particularly para. (3).

[2762] See article 20, para. 2, of the 1978 Vienna Convention and guideline 5.1.1, para. 2.

[2763] See guideline 5.2.5, para. (2).

5.3.3 Timing of the effects of non-maintenance by a successor State of an express acceptance formulated by the predecessor State

The non-maintenance, in conformity with guideline 5.3.1 or guideline 5.3.2, paragraph 2, by the successor State of the express acceptance by the predecessor State of a reservation formulated by a contracting State or a contracting organization becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

Commentary

This guideline concerns the effects *ratione temporis* of the non-maintenance by a successor State of an express acceptance of a reservation by the predecessor State. On that point, there seems to be no reason to depart from the approach adopted in guideline 5.1.7 concerning the timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State.

5.4 Legal effects of reservations, acceptances and objections in cases of succession of States

1. Reservations, acceptances and objections considered as being maintained pursuant to the guidelines contained in this Part of the Guide to Practice shall continue to produce their legal effects in conformity with the provisions of Part 4 of the Guide.

2. Part 4 of the Guide to Practice is also applicable, *mutatis mutandis*, to new reservations, acceptances and objections formulated by a successor State in conformity with the provisions of the present Part of the Guide.

Commentary

(1) This guideline, based on a former draft guideline in which the reference to Part 4 of the Guide to Practice concerned the effects of reservations alone,[2764] was introduced by the Commission when it adopted the final version of the Guide and extends the reference to include acceptances and objections. The aim of the guideline is to serve as a reminder that Part 4 of the Guide to Practice, which concerns the legal effects of a reservation, objection or acceptance, applies also to new reservations, objections and acceptances formulated by a successor State. With regard to reservations, objections and acceptances formulated by a newly independent State, this derives from the reference to articles 20 to 23 of the Vienna Convention on the Law of Treaties contained in article 20, paragraph 3, of the 1978 Vienna Convention. The present guideline also covers new reservations that a successor State may formulate in accordance with guideline 5.1.2, paragraph 3, and new objections formulated in accordance with guidelines 5.2.5 and 5.2.6.

(2) While this statement might seem self-evident, it is useful to set it out in a guideline so as to emphasize that a successor State that formulates a new reservation or a new objection or acceptance[2765] is in the same position, with respect to their legal effects, as any other State or international organization that is the author of a reservation or objection.[2766]

[2764] Former draft guideline 5.1.4. For the commentary thereto, see *Official Records of the General Assembly, Sixty-fifth session, Supplement No. 10* (A/65/10), pp. 249 and 250.

[2765] These can only be express acceptances; by definition, tacit acceptances are not "formulated".

[2766] See the text of the guidelines in Part 4 of the Guide and commentaries thereto.

5.5 Interpretative declarations in cases of succession of States

1. A successor State should clarify its position concerning interpretative declarations formulated by the predecessor State. In the absence of such clarification, a successor State shall be considered as maintaining the interpretative declarations of the predecessor State.

2. Paragraph 1 is without prejudice to cases in which the successor State has demonstrated, by its conduct, its intention to maintain or to reject an interpretative declaration formulated by the predecessor State.

Commentary

(1) The succession of States to treaties may also raise questions with regard to interpretative declarations, on which the 1978 Vienna Convention, despite an unsuccessful attempt at an amendment,[2767] is as silent as the 1969 and 1986 Conventions.

(2) Although the text of the Convention is silent on this matter, two questions remain: the first concerns the status of interpretative declarations formulated by the predecessor State, while the second is whether the successor State has the right to formulate its own interpretative declarations when it succeeds to the treaty, or thereafter. In either case, it must be borne in mind that according to guideline 2.4.4, "without prejudice to the provisions of guidelines 1.4 and 2.4.7, an interpretative declaration may be formulated at any time".[2768]

(3) Guideline 5.5, which is formulated in general terms in order to cover all cases of succession, seeks to answer the first of the two questions raised in the preceding paragraph, namely, the status of interpretative declarations formulated by the predecessor State. Practice provides no answer to this question. Furthermore, interpretative declarations are extremely diverse, both in their intrinsic nature and in their potential effects. It is these considerations, moreover, that explain, at least in part, the lack of detail in the rules applicable to interpretative declarations in the Guide to Practice. Under these conditions, it is probably best to opt for prudence and pragmatism.

(4) In this spirit, paragraph 1 of the guideline makes a recommendation that States should clarify their position concerning interpretative declarations formulated by the predecessor State. On several occasions, the Commission has taken the view that such an approach was

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[2767] At the Vienna Conference, the delegation of the Federal Republic of Germany proposed an amendment that would have expanded the scope of article 20, the only provision of the 1978 Convention in which the status of reservations is mentioned. The amendment would have preceded the rules concerning reservations, as proposed by the International Law Commission, with a statement that "any statement or instrument made in respect to the treaty in connection with its conclusion or signature by the predecessor State, shall remain effective for the newly independent State" (A/CONF.80/16, 28th meeting; and A/CONF.80/14, para. 118 (b), reproduced in *Documents of the Conference* (A/CONF.80/16/Add.2)). The delegation of the Federal Republic of Germany later withdrew this proposed amendment, to which, for various reasons, several delegations had objected (A/CONF.80/16, 27th meeting, para. 73 (Algeria, which considered that the proposed amendment seemed to affect the principle of self-determination); para. 78 (Poland, which believed that the proposed amendment was not sufficiently clear); para. 87 (Madagascar, which was of the view that the wording of the proposed amendment was "much too broad in scope"); para. 90 (Guyana); and para. 95 (Italy, which found the wording of the proposed amendment "very strong and inflexible")).

[2768] Guideline 1.4 concerns conditional interpretative declarations, which appear to be subject to the legal regime applicable to reservations. Guideline 2.4.7 concerns the late formulation of an interpretative declaration where a treaty provides that an interpretative declaration may be made only at specified times, in which case this special rule takes precedence over the general rule.

appropriate in the context of a Guide to Practice that is not intended to become the text of a convention.[2769] This is especially true in the present case since, in the absence of express treaty provisions, States have broad discretion as to whether and when to make such declarations.

(5) That said, paragraph 1 also sets forth the presumption, which seems reasonable in the context of succession to treaties, that, in the absence of such clarification, a successor State shall be considered as maintaining the interpretative declarations of the predecessor State.

(6) Furthermore, paragraph 2 of the guideline recognizes that there are situations in which, in the absence of an explicit position taken by the successor State, the latter's conduct might answer the question of whether or not it subscribes to an interpretative declaration formulated by the predecessor State; in such cases, this conduct would suffice to establish the status of the predecessor State's interpretative declarations.

(7) With regard to the second question raised in paragraph (2) of the commentary to this guideline, namely the successor State's right to formulate interpretative declarations, including declarations that the predecessor State did not formulate, there is little doubt that the existence of this right derives directly from guideline 2.4.4, which states that an interpretative declaration may, with some exceptions, be formulated at any time.[2770] Hence there appears to be no valid reason to deprive any successor State of a right that the predecessor State could have exercised at any time. The Commission therefore did not deem it necessary to devote a specific guideline to this question.

[2769] See in particular guidelines 2.1.2, 2.4.1, 2.4.5, 2.6.9 and 2.9.3.

[2770] See also footnote 2768 above.

Annex
Conclusions on the reservations dialogue

The International Law Commission,

Recalling the provisions on reservations to treaties contained in the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,

Taking into account the seventeenth report[2771] presented by the Special Rapporteur on the topic "Reservations to treaties", which addresses the question of the reservations dialogue,

Bearing in mind the need to achieve a satisfactory balance between the objectives of safeguarding the integrity of multilateral treaties and securing the widest possible participation therein,

Recognizing the role that reservations to treaties may play in achieving this balance,

Concerned at the number of reservations that appear incompatible with the limits imposed by the law of treaties, in particular article 19 of the Vienna Conventions on the Law of Treaties,

Aware of the difficulties raised by the assessment of the validity of reservations,

Convinced of the usefulness of a pragmatic dialogue with the author of a reservation,

Welcoming the efforts made in recent years, including within the framework of international organizations and human rights treaty bodies, to encourage such a dialogue,

I. Considers that:

1. States and international organizations intending to formulate reservations should do so as precisely and narrowly as possible, consider limiting their scope and ensure that they are not incompatible with the object and purpose of the treaty to which they relate;

2. In formulating a unilateral statement, States and international organizations should indicate whether it amounts to a reservation and, if so, explain why the reservation is deemed necessary and the effect it will have on the fulfilment by its author of its obligations under the treaty;

3. Statements of reasons by the author of a reservation are important for the assessment of the validity of the reservation, and States and international organizations should state the reason for any modification of a reservation;

4. States and international organizations should periodically review their reservations with a view to limiting their scope or withdrawing them where appropriate;

5. The concerns about reservations that are frequently expressed by States and international organizations, as well as monitoring bodies, may be useful for the assessment of the validity of reservations;

6. States and international organizations, as well as monitoring bodies, should explain to the author of a reservation the reasons for their concerns about the reservation and, where appropriate, request any clarification that they deem useful;

[2771] A/CN.4/647, paras. 2 to 68.

7. States and international organizations, as well as monitoring bodies, if they deem it useful, should encourage the withdrawal of reservations, the reconsideration of the need for a reservation or the gradual reduction of the scope of a reservation through partial withdrawals;

8. States and international organizations should address the concerns and reactions of other States, international organizations and monitoring bodies and take them into account, to the extent possible, with a view to reconsidering, modifying or withdrawing a reservation;

9. States and international organizations, as well as monitoring bodies, should cooperate as closely as possible in order to exchange views on reservations in respect of which concerns have been raised and coordinate the measures to be taken; and

II. Recommends that:

The General Assembly call upon States and international organizations, as well as monitoring bodies, to initiate and pursue such a reservations dialogue in a pragmatic and transparent manner.

Bibliography concerning reservations to treaties

The bibliography concerning reservations to treaties is very extensive. The one contained in this document does not seek to be exhaustive.[2772]

In principle, the following pages feature only works dealing directly with reservations, except for general works on international law (manuals and treaties) and those on the law of treaties in general.

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[2772] This is an updated version of the bibliography which had been annexed to the second report on Reservations to treaties (A/CN.4/478 – 1996), first completed in 1999 (A/CN.4/478/Rev.1). The present version has been established with Ms. Maria A. Etchegorry's assistance.

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